



Pretrial Detention in South Asia: Examining the Situation in India, Pakistan and Bangladesh

Vrinda Bhandari

Masters in Public Policy, Blavatnik School of Government, University of Oxford, 2014

BCL (Distinction) (equivalent to a Masters in Law), Faculty of Law, University of Oxford, 2013

B.A., LL.B. (Hons.), National Law School of India University, Bangalore, India, 2012

Intern, Open Society Justice Initiative, 2014

Table of Contents

LIST OF TABLES AND GRAPHS	4
LIST OF ABBREVIATIONS.....	6
EXECUTIVE SUMMARY	7
INTRODUCTION.....	9
COUNTRY REPORT FOR INDIA.....	13
I. COUNTRY BACKGROUND	13
II. HISTORICAL TRENDS	14
III. EXISTING LAWS AND PRACTICE.....	15
A. <i>Laws and Jurisprudence</i>	15
(I) Investigatory provisions	15
(II) Bailable and non-bailable offences	16
(III) Alternatives to pretrial detention.....	19
(IV) Anticipatory bail	20
(V) Extraordinary laws	21
(VI) Legal aid provisions	22
B. <i>Practice</i>	24
(I) Bailable and non-bailable offences	24
(II) Extraordinary laws.....	25
(III) Legal aid provisions	26
IV. ANALYSIS: UNDERSTANDING THE DISJUNCTURE BETWEEN LAW AND PRACTICE.....	27
A. <i>Police</i>	28
(I) Corruption	28
(II) Poor resource allocation and working conditions	29
(III) Misuse of the powers of arrest	30
(IV) Shortage of police officers.....	32
B. <i>Prosecutors</i>	36
C. <i>The Judiciary</i>	36
(I) Backlog in the judicial system.....	36
D. <i>Prison Officials</i>	38
E. <i>Ignorance about rights</i>	39
F. <i>Inability to pay the bail bonds</i>	41
G. <i>Inability to effectively utilize the legal aid provisions</i>	43
V. SOLUTIONS AND RECOMMENDATIONS	44
A. <i>Institutionalizing prison visits</i>	44
B. <i>Improving access to lawyers</i>	45
C. <i>Improving access to judges and courts</i>	46
COUNTRY REPORT FOR PAKISTAN	47
I. COUNTRY BACKGROUND	47
II. HISTORICAL TRENDS	48
III. EXISTING LAWS AND PRACTICE.....	49
A. <i>Laws and Jurisprudence</i>	49
(I) Investigatory provisions	49
(II) Bailable and non-bailable offences	50
(III) Alternatives to pretrial detention.....	53
(IV) Anticipatory bail	53
(V) Extraordinary laws	54
(VI) Legal Aid provisions	55
B. <i>Practice</i>	55

(I) Investigatory provisions	55
(II) Bailable and non-bailable offences	56
(III) Legal aid provisions	57
IV. ANALYSIS: UNDERSTANDING THE DISJUNCTURE BETWEEN LAW AND PRACTICE.....	57
A. <i>Police</i>	57
(I) Corruption	58
(II) Poor resource allocation and working conditions	58
(III) Budgetary Shortfall.....	59
B. <i>The Prosecutors</i>	59
C. <i>The Judiciary</i>	60
(I) Backlog in the judicial system.....	60
(II) Corruption.....	61
(III) Security concerns	62
D. <i>Inability to pay the bail bonds</i>	62
E. <i>Inability to effectively utilize the legal aid provisions</i>	63
V. SOLUTIONS AND RECOMMENDATIONS	63
A. <i>The National Judicial Policy</i>	63
(I) Corruption	63
(II) Backlog	64
B. <i>Support to Punjab Prosecution Service</i>	65
COUNTRY REPORT FOR BANGLADESH	66
I. COUNTRY BACKGROUND	66
II. HISTORICAL TRENDS	67
III. EXISTING LAWS AND PRACTICE.....	68
A. <i>Laws and jurisprudence</i>	68
(I) Investigatory provisions	68
(II) Bailable and non-bailable offences	69
(III) Alternatives to pretrial detention.....	71
(IV) Anticipatory bail	71
(V) Legal aid provisions	72
B. <i>Practice</i>	73
(I) Bailable and non-bailable offences	73
(II) Legal aid provisions	74
IV. ANALYSIS: UNDERSTANDING THE DISJUNCTURE BETWEEN LAW AND PRACTICE.....	75
A. <i>Police</i>	75
(I) Corruption	75
(II) Misuse of the power of arrests	75
B. <i>The Prosecutors</i>	75
C. <i>The Judiciary</i>	76
(I) Backlog in the judicial system.....	76
(II) Corruption.....	77
D. <i>Prison officials</i>	78
E. <i>Inability to pay the bail bonds</i>	78
F. <i>Inability to effectively utilize the legal aid provisions</i>	78
V. SOLUTIONS AND RECOMMENDATIONS	79
A. <i>The IRSOP Project</i>	79
ANALYSIS: COMMON THEMES EXPLAINING THE HIGH INCIDENCE OF PRETRIAL DETENTION IN INDIA, PAKISTAN AND BANGLADESH.....	81
I. HIGH INCIDENCE OF CORRUPTION.....	82
II. SHORTAGE OF HUMAN, PHYSICAL AND MONETARY RESOURCES.....	84
III. BACKLOG OF CASES.....	87
IV. GOVERNANCE ISSUES AND A LACK OF COORDINATION.....	88
V. CONCLUDING REMARKS.....	89

List of Tables and Graphs

List of Tables:

- **Table 1:** Current occupancy levels, prisoner and pretrial detainee numbers in South Asia
- **Table 2:** Population, economy, administration and criminal justice system figures for India
- **Table 3:** Changing prisoner and pretrial detainee numbers in India, 2000-2012
- **Table 4:** Number of pretrial detainees by period of detention at the end of the year, 1995-2012
- **Table 5:** Details of pretrial detainees released or transferred, 2004-2012
- **Table 6:** Annual and biennial changing prisoner and pretrial detainee numbers in India, 2004-2012
- **Table 7:** Total number of arrests for IPC and SLL crimes, 1995-2012
- **Table 8:** Total number of arrests for IPC crimes, 1995-2012
- **Table 9:** Current police personnel numbers and police-population ratios in South Asia
- **Table 10:** Current Strength of the Indian police force compared to its sanctioned strength and the UN norm
- **Table 11:** Intra-state comparison of the number of pretrial detainees, incidence of violent crime, number of arrests, police-population ratios and sanctioned and actual strength of prison officials in India
- **Table 12:** Court wise breakdown of judicial vacancies in India, 2012-13
- **Table 13:** Educational qualifications of pretrial detainees, 2000-2012
- **Table 14:** Religious affiliations of pretrial detainees, 2000-2012
- **Table 15:** Central Jail (Tihar Jail) breakdown of pretrial detainees on the basis of income at the end of 2012
- **Table 16:** Number of pretrial detainees in Rajasthan, Chhattisgarh and Madhya Pradesh, 2001-2003
- **Table 17:** Population, economy, administration and criminal justice system figures for Pakistan
- **Table 18:** Changing prisoner and pretrial detainee numbers in Pakistan, 1999-2012
- **Table 19:** Current province-wise breakdown of the number of prisoners and pretrial detainees
- **Table 20:** Province-wise breakdown of the percentage of people receiving legal aid
- **Table 21:** Population, economy, administration and criminal justice system figures for Bangladesh
- **Table 22:** Changing prisoner and pretrial detainee numbers in Bangladesh, 2003-2014
- **Table 23:** Court-wise breakdown of the backlog in the Subordinate Judiciary, 2012

- **Table 24:** Transparency International Household Survey on the reasons for bribing the judicial service, 2010
- **Table 25:** Performance of India, Pakistan, and Bangladesh on various corruption barometers, including the percentage of people reported paying a bribe to the police or the Judiciary
- **Table 26:** Current police personnel numbers and police-population ratios in South Asia in comparison with Brazil, Russia and USA
- **Table 27:** Current judge to population ratios in South Asia compared to other countries
- **Table 28:** Current backlog of cases in India, Pakistan, and Bangladesh
- **Table 29:** Judicial independence and rule of law percentile rank in India, Pakistan, and Bangladesh

List of Graphs:

- **Graph 1:** Varying bail bond amounts for cases under the Narcotic Drugs and Psychotropic Substances Act (India)
- **Graph 2:** Diversion of public funds to individuals, groups or companies because of corruption
- **Graph 3:** Irregular payment and bribes by firms, for *inter alia*, obtaining a favorable judicial decision:
- **Graph 4:** Reliability of police services
- **Graph 5:** Conviction rates in India, Pakistan, Australia, Japan, South Africa, and USA
- **Graph 6:** Judicial independence from members of government, firms and citizens

List of Abbreviations

1. ALRC: Asian Legal Resources Centre
2. AHRC: Asia Human Rights Commission
3. BPR&D: Bureau of Police Research and Development
4. CHRI: Commonwealth Human Rights Initiative
5. CrPC: Code of Criminal Procedure
6. EII: Economist Intelligence Unit
7. FATA: Federally Administered Tribal Areas (Pakistan)
8. FCR: Frontier Crimes Regulation (Pakistan)
9. FIR: First Information Report
10. FOSI: Foundation Open Society Institute-Pakistan
11. GIZ: Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH
(German Federal Enterprise for International Cooperation)
12. HRCP: Human Rights Commission of Pakistan
13. ICG: International Crisis Group
14. ICPS: International Centre for Prison Studies
15. IMF: International Monetary Fund
16. IPC: Indian Penal Code
17. IRSOP: Improvement of the Real Situation of Overcrowding in Prisons
(Bangladesh)
18. LSA: Legal Services Authorities (India)
19. NALSA: National Legal Services Authorities Act (India)
20. NCRB: National Crimes Record Bureau (India)
21. NIPSA: Network for Improved Policing in South Asia
22. PPC: Pakistan Penal Code
23. PTD: pretrial detainees
24. SC/ST: Schedule Caste/Schedule Tribes
25. SPSS: Support to Punjab Prosecution Service, Pakistan
26. SLL: Special and Local Laws (India)
27. UN: United Nations
28. UNAFEI: United Nations Asia and Far East Institute for the Prevention of Crime
and the Treatment of Offenders
29. UNDP: United Nations Development Programme
30. UNODC: United Nations Office on Drugs and Crime
31. US: United States of America
32. VIP: very important person (colloquial)
33. WB: The World Bank

Executive Summary

India, Pakistan and Bangladesh together cover about a quarter (24%) of the world's population, but only about a tenth (10.7%) of the global pretrial detention population. The average rate of pretrial detention in these three countries is 22.4 per 100,000 of the general population, less than half the global average. Nevertheless, cumulatively, 66.5% of all prisoners here are pretrial detainees, a figure which is over twice the global average. What explains this high figure?

This report looks at the country backgrounds, existing jurisprudence, and practice of pretrial detention in India, Pakistan, and Bangladesh to try and explain the high incidence of pretrial detention. Being successors to the British colonial state, these countries have similar penal and criminal procedure codes, and concepts applicable to pretrial detention.

To understand the historical and continuing trends of pretrial detention, the report analyzes the disjuncture between the law in theory and the practice of pretrial detention. It identifies several factors contributing to the problem:

- police officers – they are often corrupt, underpaid and under-staffed, to the extent that often there is no one to escort the accused to court. The three countries do not distinguish the investigatory duties of officers from the maintenance of law and order and provision of security to “protected persons” or VIPs. This leaves the police with lesser time to investigate cases, which delays the filing of police reports, and eventually, delays the conclusion of trial;
- prosecutors – they are also understaffed (with many vacancies) and underpaid, and lack basic facilities such as access to legal databases, research and administrative assistants. Prosecutors often do not play a significant role in guiding the conduct of investigation;
- the Judiciary – there is a serious problem of backlog of cases in all three countries; in India, it is 30 million (2014); in Pakistan, it is 1.6 million (2012); and in Bangladesh, an estimated 2 million cases are currently before the lower courts. A low judge to population ratio and the prevalence of judicial vacancies contributes to the backlog. Instances of corruption can also determine who remains in pretrial detention and who gets bail;
- prison officials – who are often underpaid and overworked and lack the incentives to regularly review the legal status of pretrial detainees to determine whether they have spent enough time in custody so as to warrant release;
- apart from the functionaries in the criminal justice system, pretrial detention is also caused by the inability to pay bail bonds, either when granted bail in a non-bailable offence or when the person is accused of a bailable offence. This is partly due to the profile of the pretrial detainees, who are often from lower socio-economic backgrounds and are ignorant about their rights; and
- inability to effectively utilize legal aid provisions – in part, this is also due to the socio-economic profile of the detainees and the low levels of legal literacy.

Moreover, there is often a lack of coordination amongst the legal services authority and the prison officials who fail to identify the pretrial detainees most in need of legal aid. Even then, there is little incentive for legal aid lawyers (beyond intrinsic motivation) to put in the requisite effort, given that they are paid only minimally.

The report thus analyzes the data in terms of the criminal justice functionaries and the profile of the pretrial detainees, which makes it hard for them to pay the bail amounts and effectively access legal aid. The final section examines the data from another lens and identifies common factors, which might explain the high proportion of pretrial detainees amongst the prison population in India, Pakistan and Bangladesh. These factors are:

- high incidence of corruption;
- shortage of human, physical and monetary resources;
- the problems caused due to a backlog of cases; and
- lack of coordination and governance issues such as judicial independence.

The report finds no easy solutions to the problem. *First*, the scope and extent of the problem, in terms of intra-country variation and the practice on the ground, is not immediately discernible. *Secondly*, the relationship between the different causal factors (the functionaries of the criminal justice system and the profile of the pretrial detainees) and how they interact with, and are influenced by, each other is unclear. *Thirdly*, first-hand experience and secondary data was not always available. Notwithstanding this, the report concludes that emphasis should be on ensuring the implementation of existing provisions and directives, instead of merely starting new initiatives; and the mapping of the landscape to prevent duplication of work.

Introduction

Almost every third prisoner (32%) around the world is awaiting trial or the conclusion of trial. The world's 3.3 million pretrial detainees¹ are persons who have not been convicted of the charge(s) for which they have been detained, and are presumed innocent (in most jurisdictions). Another way of counting global pretrial detainees is not in relation to the prison population, but as a rate of the general population. Thus, in 2013, there were 50.4 pretrial detainees for every 100,000 people in the world.

An intriguing regional outlier in terms of pretrial detention use and dynamics is South Asia, in particular the successor states of the British Indian Empire: India, Pakistan, and Bangladesh.² Collectively these three countries, which comprise almost a quarter (24%) of the world's population, contain only about a tenth of the global pretrial detention population (10.7%) and a twentieth (5.1%) of all prisoners worldwide.³ The average rate of pretrial detention in these three countries is 22.4 per 100,000 of the general population, less than half the global average. However, the number of pretrial detainees as a proportion of all prisoners is 66.5% – over twice the global average. Similar, albeit somewhat less pronounced, trends are present in the two less populous South Asian countries of Nepal and Sri Lanka (see Table 1).

Table 1: Current occupancy levels, prisoner and pretrial detainee numbers in South Asia

Country	Pretrial detainees/total inmates (% of prison population)	Prison population rate/100,000 population	Pre-trial/remand population rate/ 100,000	Occupancy level (based on % capacity)
Bangladesh	69	42 (2014)	29 (2014)	192.2
India	66.2	30(2012)	20 (2012)	112.2
Pakistan	66.2	41 (2012)	27 (2012)	177.4
Nepal	58.9	51 (2014)	17 (2009)	250.5
Sri Lanka	43.9	105 (2013)	46 (2013)	190.6
All Asia	47.8			
Europe	20.5			
The World	32	157.6 (2013)	50.4 (2012)	118

Sources: ICPS, World Prison Brief and Human Rights Watch⁴

What explains this high proportion of pretrial detention population in India, Pakistan, and Bangladesh? While partly a result of relatively low overall convict populations, this report concludes that commonalities in the functioning of the criminal justice system – high

¹ Pretrial detainees are also called “awaiting trial” detainees or “undertrials” in some jurisdictions. In India, Pakistan and Bangladesh, the term used is undertrial population.

² The partition of India into the sovereign states of the Islamic Republic of Pakistan and the Republic of India occurred in 1947. The People's Republic of Bangladesh came about through its secession from Pakistan in 1971.

³ International Centre for Prison Studies, *World Prison Brief*, available at <<http://www.prisonstudies.org/world-prison-brief>>.

⁴ Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Non Felony Defendants in New York City* 63 (2010) available at <http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf>.

incidence of corruption; shortage of human, physical and monetary resources; backlog of cases; and governance and lack of coordination – contribute to the high number of pretrial detainees in the prison population.

The report begins by examining the laws and practice of pretrial detention in each country. It then tries to explain the disjuncture between the two by analyzing *first*, the role of various functionaries, namely the police, the prosecutors, the Judiciary, and prison officials; *second*, the profile of the pretrial detainees and their (in)ability to pay the bail bond; and *finally*, the (in)effectiveness of the existing legal aid system. Each country report ends by describing existing solutions.

Dysfunctional systems, including under-staffed and under-paid prosecutors; poor quality of police investigations; and widespread corruption, limit the number of serious offenders these countries are capable of arresting, prosecuting, convicting, and imprisoning. Consequently, a relatively high number of pretrial detainees do not end up standing trial, or, if tried, not being convicted.⁵ Moreover, there is likely a tendency – or temptation – by criminal justice officials to view pretrial detention as a form of punishment given that the backlog of cases stretches the conclusion of trial and makes post-conviction prison sentences relatively difficult to obtain. The situation is exacerbated because those awaiting trial are often poor, ignorant about their rights, unable to access legal aid, and incapable of paying the requisite bail amounts. The report delves further into these issues in its country reports for India, Pakistan and Bangladesh, tying them up with a concluding analysis section.

South Asia's imprisonment dynamics are likely to change; as countries grow, urbanization rates increase and the middle classes expand. As a demographic, middle classes have more assets at risk of being stolen compared to their poorer, more rural compatriots. Members of the middle classes are consequently more concerned about crime and often possess the political clout to push governments to action. Typically, governments respond by increasing the size and budgets of their visible (uniformed) policing – a relatively quick and noticeable response popular with crime-weary citizens. Focused in growing urban areas, more policing often leads to more arrests.

⁵ The conviction rate for Pakistan is between 5-10% as per the report of the International Crisis Group and the Foundation for Open Society Institute-Pakistan, while the Senior Police Superintendent at Regional Investigation Branch at Rawalpindi, Pakistan estimated it to be 11.55%. In Bangladesh, similarly, only 10% of those brought to trial are convicted. India's conviction rate is slightly higher at 37%, although it pales in comparison to countries such as Australia and USA (85% each). See Muhammad Waheed, *Victims of Crime in Pakistan*, The 144th International Senior Seminar Participants' Papers, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders ("UNAFEI"), <http://www.unafei.or.jp/english/pdf/RS_No81/No81_14PA_Waheed.pdf> at 144; Yuruzu Takahashi, *Remarks by Programming Officer, UNAFEI*, <http://www.unafei.or.jp/english/pdf/RS_No53/No53_09RPO.pdf> at 37; US State Department, "Bangladesh", *Country Report on Human Rights Practices* <<http://www.state.gov/documents/organization/.pdf>> at 15.

However, lacking the resources of high-income countries, middle and low-income countries⁶ typically fail to invest in a sufficient number of investigators, forensic crime laboratories, courtrooms, judicial officers, and prosecutors to keep pace with rising arrests. Overburdened by the flood of arrestees, prisons experience an increase in the number of pretrial detainees and overcrowding.

If economic growth, rising urbanization, and an expanding middle class are a likely future for South Asia, especially in the populous countries of India, Pakistan, and Bangladesh, then an increasing number of pretrial detainees can be expected in the region. This is worrying as excessive and arbitrary pretrial detention is not just a human rights violation; it is also related to a nexus of other abuses and ill effects. The overuse of pretrial detention is linked to torture, corruption, and the spread of disease; it can stunt economic development and undermine the rule of law.⁷

If, for instance, the rate of pretrial detention in India, Pakistan, and Bangladesh were to reach the global average, the number of pretrial detainees in these three countries would jump from more than 350,000 to almost 800,000. This would constitute a marked increase in the global pretrial detainee population. Consequently, this report – while focusing on South Asia – should be of interest to anyone concerned about the excessive use of pretrial detention and its negative consequences.

Moreover, China and Nigeria, respectively the most populous countries in the world and Africa, face a similar pretrial detention dynamic to that found in South Asia. According to the International Centre for Prison Studies (“ICPS”), the pretrial detention rate per 100,000 of the general population is 18.5 in China⁸ and 22 in Nigeria.⁹ Both are far below the global average of 50.4 per 100,000. If these countries’ pretrial detention numbers move closer to the international norm, it could significantly increase global pretrial detainee numbers.

Understanding pretrial detention dynamics in India, Pakistan, and Bangladesh may help us predict future detention trends in South Asia, and possibly, other places where pretrial detention rates are presently at similarly low levels.

Before proceeding with the report, it is necessary to mention some caveats. This report is primarily a product of desk-based research of secondary sources, with some input based on my own experience in India and interviews with practicing lawyers and civil servants in India, Pakistan, and Bangladesh. However, in some cases, data was simply unavailable. Furthermore, my primary research comprised a very small sample; the views of the

⁶ As per the World Bank, India and Pakistan are lower middle-income countries, while Bangladesh is a low income country.

⁷ See, Martin Schönteich, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, Open Society Justice Initiative, New York, 2014 (forthcoming).

⁸ Based on a pretrial detention population of 250,000. See International Centre for Prison Studies, World Prison Brief, *China*, <<http://www.prisonstudies.org/country/china>>.

⁹ Based on a pretrial detention population of 38,500. See: International Centre for Prison Studies, World Prison Brief, *Nigeria*, <<http://www.prisonstudies.org/country/nigeria>>.

respondents may not be representative of the entire population or the functioning of the criminal justice system in every part of their country.

Interestingly, if somewhat unsurprisingly, criminal codes in India, Pakistan, and Bangladesh originate from the same source, Lord Macaulay's Indian Penal Code ("IPC") of 1860 and the Code of Criminal Procedure ("CrPC") of 1898. Hence, they share concepts of 'bailable' and 'non-bailable' offences (in the former, bail is a right and the latter, at the judge's discretion); 'cognizable' and 'non-cognizable' offences (the power to arrest without or with a warrant respectively) and 'compoundable' (minor offences where the victim can, *suo motu* or with the permission of the court, enter into a compromise with the accused and ask the State to drop charges) and 'non-compoundable' offences. Furthermore, all three countries have a concept of anticipatory bail or 'pre-arrest bail'; here a person apprehending arrest approaches the court requesting to be released on bail *if* actually arrested. The concept arose from a desire to reduce the harassment of innocent persons against whom political and other enemies were filing false charges. It is used occasionally.¹⁰

¹⁰ For instance in India, judges only consider an anticipatory bail application if the person apprehending arrest is present in court. However, submitting to the jurisdiction of the court means that if the application is denied, the police can immediately arrest the person concerned. Hence, it is not commonplace. In both Pakistan and Bangladesh, anticipatory bail is considered an "extraordinary" remedy, not the norm.

Country Report for India

I. Country Background

Table 2: Population, economy, administration and criminal justice system figures for India

Population figures	Numbers
Present population (2014)	1.25 billion
Expected population (2050)	1.62 billion
Proportion of population under the age of 15 years	31%
Urbanization rate (urban population as a % of total) (2013) (WB) ¹¹	32%
Economy	
Nominal GDP (US\$) (EII)	2.138 trillion
GDP per capita (US\$ at PPP) (EII)	5803
GDP (current US\$)(2013) (WB)	1.877 trillion
GNI per capita, Atlas method (current US\$)(2013) (WB)	1570
Gini index (2010) (WB)	33.9
Administration	
Form of government	Federal republic
Number of states	29 states and 7 union territories
Judicial system`	The Supreme Court is the apex court of the country followed by 24 High Courts and various civil and criminal courts of first instance.
Criminal Justice System	
Criminal justice tradition	Common law
Hierarchy of criminal courts	Graphically represented below with the courts at the lowest level called Judicial Magistrates, followed by judges at the Sessions and High Court
Number of all crimes recorded (incidence) (2012)	60.415 million
Number of arrests (2012)	7,420,091
Number of police officers (2010)	1,580,311
Number of police officers per 100,000 population (2010) (UNODC)	131.1
Number of judges (sanctioned strength) (2013)	20,175
Number of judges per million population (2012)	Around 13

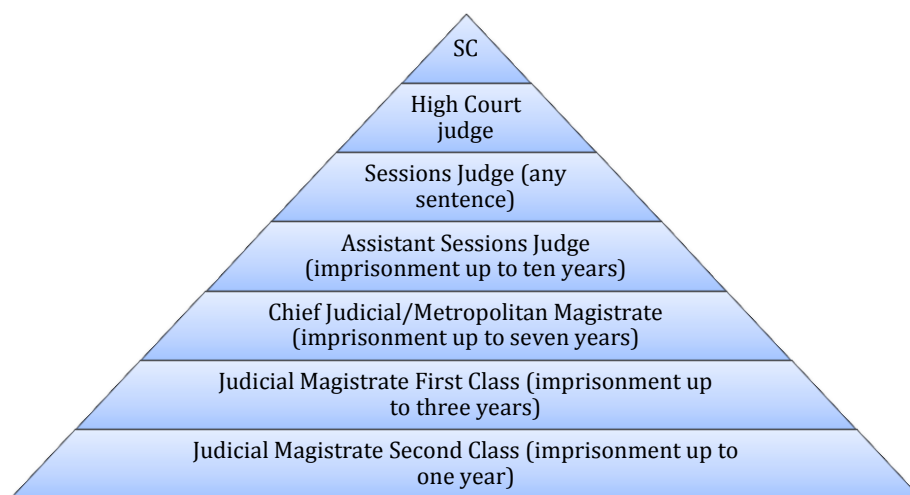
Sources: the Economist Intelligence Unit;¹² the Kaiser Family Foundation;¹³ the National Crimes Record Bureau (“NCRB”);¹⁴ the Indian Supreme Court;¹⁵ the Parliamentary Committee on

¹¹ The World Bank calculates this as people living in urban areas, as defined by national statistical offices. It is calculated using World Bank population estimates and urban ratios from the United Nations World Urbanization Prospects.

¹² Economist Intelligent Unit, *India* (2012), <http://country.eiu.com/FileHandler.ashx?issue_id=1721994556&mode=pdf>.

¹³ The Henry J. Kaiser Family Foundation, *Population under Age 15 (Percent)*, <<http://kff.org/global-indicator/population-under-age-15/>>.

Empowerment of Women;¹⁶ the United Nations (“UN”) Population Division;¹⁷ the United Nations Office on Drugs and Crime (“UNODC”);¹⁸ and the World Bank (“WB”).¹⁹



For research on India, I relied on my own experiences, especially as an intern at the National Judicial Academy in Bhopal and talked to an academic and some practicing lawyers.

II. Historical trends

Table 3: Changing prisoner and pretrial detainee numbers in India, 2000-2012

Year	Number of prisoners	Number of pretrial detainees	PTD/imp (%) of prison population)	Pre-trial/remand population rate/ 100,000
2000	271,948	193,627	71.2%	18
2005	358,120	237,076	66.2%	21
2010	368,998	240,098	65.1%	19
2012	385,135	254,857	66.2%	20

Source: ICPS, World Prison Brief²⁰

¹⁴ National Crime Records Bureau (“NCRB”), *Crime in India*, 2012, < <http://ncrb.gov.in/CD-CII2012/Home.asp>>, at Tables 1.2 and 12.8 (*hereinafter* NCRB, *Crime in India*)

¹⁵ Supreme Court of India, 8(4) COURT NEWS (2013), <http://supremecourtfindia.nic.in/courtnews/2013_issue_4.pdf>.

¹⁶ Committee on Empowerment of Women, *19th Report on Victims of Sexual Abuse and Trafficking and their Rehabilitation*, Parliament of India, Lok Sabha (2012-2013), <<http://www.scribd.com/doc/193331183/VICTIMS-OF-SEXUAL-ABUSE-AND-TRAFFICKING>>, at para 2.8.

¹⁷ UN Population Division, *World Population Prospects: The 2012 Revision* <http://esa.un.org/wpp/unpp/panel_population.htm>.

¹⁸ UN Office on Drugs and Crime, *Criminal Justice System Resources*, Crime and Criminal Justice Statistics, <<https://www.unodc.org/unodc/data-and-analysis/statistics/crime.html>>.

¹⁹ World Bank, *India*, <<http://data.worldbank.org/country/india>>; World Bank, *Gini Index*, <http://data.worldbank.org/indicator/SI.POV.?order=wbapi_data_value_2010+wbapi_data_value&sort=a_sc>; World Bank, *Urban Population (of total)*, <<http://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS/countries>>.

It is interesting to distil further data from the 2012 NCRB Prison Statistics report:²¹

First, amongst the states, there is vast discrepancy in the proportion of the pretrial detainees to the total prison population; the highest is in Arunachal Pradesh (94.4%, although having only 71 prisoners) and the lowest in Andaman and Nicobar Islands (32%, with a total of 1126 prisoners). States with a high proportion of pretrial detainees are Jammu and Kashmir (79%), Bihar (85.4%), Jharkhand (75.2%) and Delhi (73.4%).²²

Secondly, murder constitutes the single largest proportion of pretrial detainees charged for offences under the Indian Penal Code (“IPC”): 26.9% (54,715 of total 202,762 pretrial detainees for IPC crimes).²³ Six states, Uttar Pradesh; Madhya Pradesh; Bihar; Karnataka; Maharashtra; and Odisha account for 53% of the total pretrial detainees in jail on accusations of murder. After murder, theft (11.5%) and attempt to murder (10.6%) contribute to the next largest share of the pretrial detainees in custody for IPC offences.

Finally, Special and Local Laws (“SLL”) contribute to 20.4% (52,066) of the total number of pretrial detainees. Of these, those accused under the Narcotic Drug and Psychotropic Substances Act form the highest proportion (27.6% or 14,361) of total pretrial detainees under SLL). This is followed by those charged with offences under the Arms Act (17.6%) and the Excise Act (11.8%).

III. Existing laws and practice

A. Laws and Jurisprudence

(I) INVESTIGATORY PROVISIONS

Section 167(2) of the CrPC authorizes the Judicial Magistrate to send an accused to police custody for 15 days if the police investigation cannot be completed within the mandated 24 hours. Beyond this, if the Magistrate “is satisfied that adequate grounds exist”, they may authorize a further judicial custody up to a 60 or 90 days based on whether the alleged

²⁰ The number of prisoners has been calculated from the ICPS data based on the number of pretrial detainees and their proportion in the population. Although pre-2000 data is available in NCRB’s Prison Statistics Reports; it suffers from a few flaws and has not been used:

- a. The 1995 Report in some instances records more pretrial detainees than the entire prison population. For instance, in Karnataka, the total recorded inmate population is 7422 whereas the number of pretrial detainees is 26,122. Similarly, in Kerala, the total inmate population is recorded as 4853, whereas 28,972 pretrial detainees have been recorded.
- b. The 1997 report suffers from a different type of discrepancy. Three major states (Bihar, Haryana and Jammu and Kashmir) record the inmate population as “NA”; yet, they still give figures for the number of pretrial detainees. However, even these figures cannot be verified since their breakdown has been noted as “NA”. Hence, NCRB data for 95/97 is not useful.

²¹ NCRB, *Prison Statistics India 2012*, <<http://ncrb.gov.in>>, at Chapter 4 (*hereinafter* “NCRB, Prison Statistics”)

²² NCRB, *Prison Statistics 2012*, Tables 3.3 and 3.4.

²³ NCRB, *Prison Statistics 2012*, Table 4.3.

offence is punishable with a sentence of less than, or more than, ten years.²⁴ On the expiry of this period, the accused is entitled to be released on bail provided they can “furnish bail”.²⁵ In practice, if the accused is unable to post the bail amount, an application will be filed before the Court of Sessions or the High Court requesting that the bail amount be reduced.²⁶

On the power of arrest, the CrPC empowers the police to arrest a person accused of a cognizable offence without getting prior authorization from a Magistrate. The arrest powers have been narrowly interpreted and after the 2008 amendment, require proper investigation before arrests.²⁷ Earlier in 2005, the CrPC was amended to require the officer making the arrest to inform the arrested person of their rights; and to give information about the arrest “forthwith” to any family member or person nominated by the arrested person.²⁸ The Supreme Court has taken cognizance of these amendments in its decisions.²⁹

(II) BAILABLE AND NON-BAILABLE OFFENCES

- **Bailable offences**

Section 436 of the CrPC deals with bailable offences – these are listed in the first schedule to the CrPC and include comparatively less serious offences such as being a member of an unlawful assembly³⁰ or sexual harassment of the nature of making a sexually colored remark.³¹ In such cases, bail is a matter of right, rather than the discretion of the court.

²⁴ The Supreme Court has held that the accused *can* be released on bail during the 60 or 90 day period. *Sundeep Kumar Bafna v State of Maharashtra*, Criminal Appeal No. 689 of 2014, decided on 27th March, 2014. Also see R. Sharma, HUMAN RIGHTS AND BAIL 165 (2002).

²⁵ The proviso to section 167 expressly states that, “And, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail.” An explanation to the proviso was added in 1978 which clarifies that, “For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in Custody so long as he does not furnish bail.” [*Emphasis supplied*]

²⁶ Section 440(2) of the CrPC states that “The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.”

²⁷ **Section 41 of the CrPC** states that in cases where the accused has committed a cognizable offence punishable with up to seven years of imprisonment, the police can arrest without warrant only if, “the police officer is satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the offence; or to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing.” [*Emphasis supplied*]

Section 41A deals with notice of appearance before officer: “The police officer shall, in all cases where the arrest of a person is not required under the provisions of Sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.” [*Emphasis supplied*]

²⁸ Section 50A, CrPC.

²⁹ *Arnesh Kumar v State of Bihar*, Criminal Appeal No. 1277 of 2013, decided by the Supreme Court of India on 02.07.2014.

³⁰ Section 143, IPC.

³¹ Section 354A, IPC.

Section 436(1) provides that when an accused is brought before a officer in charge of a police station or the court, and “is prepared” to give bail, while in police custody or during any stage of the court proceedings, such person shall be released on bail. Thus, courts have the discretion to require the accused to pay a bail bond or to “execute a bond without sureties for his appearance” to ensure release. However, a 2005 amendment to the proviso of the section stated that:

Provided that such officer or Court, if he or it thinks fit, 2[may, and shall, if such person is indigent and in unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided”.

Explanation: Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso. [*Emphasis supplied*]

Thus, the section was amended to prevent instances of a person accused of aailable offence having to remain in prison till their case was disposed of, simply due to their inability to furnish bail or provide sureties.

The CrPC (Amendment) Act of 2005 also inserted a new section; s. 436A, which stipulates that the maximum period for which a pretrial detainee can be detained, is “*one-half of the maximum period of imprisonment specified for that offence under that law.*” After that, the accused “shall” be released by the court on their “personal bond with or without sureties”.³² However, the accused can only be considered for release; courts still retain the discretion to order continued detention, or release the accused on bail (instead of a personal bond). But in *no case* can an accused be detained for more than the maximum period of imprisonment stipulated for the offence. This provision only applies to offences where death is not stipulated as one of the punishments under law; therefore, it would not aid a person accused of murder.³³ Furthermore, this provision does not apply retrospectively; hence, it cannot help any pretrial detainee in prison before 2005.³⁴

³² As the text of section 436A reproduced in the next footnote makes clear, personal bond is distinct from money bail. As the Commonwealth Human Rights Initiative (“CHRI”) explains, a personal bond is a “*formal written agreement by which a person undertakes to perform/abstain from doing a certain act. Failure to do so, may attract monetary penalty.*” CHRI, *Right to be released on bail, available at* <http://www.humanrightsinitiative.org/publications/prisons/section_436_crpc.pdf>.

³³ **Section 436A, Maximum period for which an undertrial prisoner can be detained.** Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

- **Non-bailable offences**

Sections 437 and 439 of the CrPC deal with non-bailable offences and stipulate the conditions and considerations under which bail is granted. Special provisions are made for women, children under the age of 16 years, the sick and the infirm. Magistrates are expressly required to consider releasing an accused on bail if their trial has not concluded within sixty days.³⁵

The Supreme Court has specifically stated that bail is the rule, and jail the exception (“bail, not jail”).³⁶ If the appearance of the accused *can* be secured through other means, then it should not be necessary to hold them in pretrial detention.³⁷ Delay in prosecution and failure to monitor the conditions and time period of a person’s detention violates their right to life and personal liberty under the Indian Constitution.³⁸ Accordingly, the remand and pretrial detention period should be as short as possible.³⁹

Nevertheless, bail can be denied to prevent the accused from absconding, committing further offences, tampering with evidence or influencing witnesses.⁴⁰ Even when bail is granted, conditions can be imposed to ensure the presence of the accused, although they should not be so onerous to tantamount to denying bail.⁴¹ The Supreme Court has repeatedly referenced Law Commission and other reports (e.g. the Mulla Committee Report) which recommend streamlining the remission systems and ensuring early release to reduce prison overcrowding.⁴²

Unfortunately, the Supreme Court does not speak with one voice. Its liberal pronouncements have been interspersed with various decisions, which state that “mere long periods of incarceration” are not grounds for bail. For instance, in *Pramod Kumar Saxena v Union of India*,⁴³ the accused, implicated in 48 cases across six States for offences related to cheating and conspiracy, had been in prison for more than ten years. Even then, trial had not commenced in some of the (48) cases. The accused argued that despite being enlarged on bail in some cases, he was unable to leave prison because of the pendency of

Explanation.- In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded [*Emphasis supplied*].

³⁴ *Pramod Kumar Saxena v Union of India*, (2008) 9 SCC 685.

³⁵ **Section 437(6)** states that, “If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.”

³⁶ *State of Rajasthan v. Bal Chand*, AIR 1977 SC 2447, at para 2.

³⁷ R.V. Kelkar, CRIMINAL PROCEDURE 269 (5th edn., K.N. Chadrashekharan Pillai ed, 2008).

³⁸ *Mantoo Majumdar v. State of Bihar*, AIR 1980 SC 846 on the violation of Article 21 of the Constitution.

³⁹ *A.R. Antulay v. R.S. Nayak*, (1992) 1 SCC 225, at 270.

⁴⁰ *Panchanan Mishra v Digambar Mishra*, (2005) 3 SCC 143; *State of Rajasthan, Jaipur v Balchand @Baliy*, (1977) 4 SCC 308.

⁴¹ Sharma, *supra* note 24, at 169.

⁴² *Rama Murthy v State of Karnataka*, AIR 1997 SC 1739.

⁴³ (2008) 9 SCC 685.

other cases. Although granted “limited relief”,⁴⁴ the Court did not permit the consolidation and trial of all the cases in one court. Furthermore, it held that:

... mere long period of incarceration in jail would not be per se illegal. If the petitioner has committed offences, he has to remain behind bars. Such detention in jail even as an under-trial prisoner would not be violative of Article 21 of the Constitution. If the petitioner has committed non-bailable offences and in connection with those offences, he is in jail, the custody can never be said to be unlawful or contrary to law and he is not entitled to be enlarged on bail. [*Emphasis supplied*]

Such reasoning was adopted by the Allahabad High Court (in Uttar Pradesh) in a 2012 judgment, which held that “*mere long incarceration cannot be a ground for admitting the accused applicant on bail who is involved in a heinous and gruesome crime.*”⁴⁵ Despite the accused being in custody for four years, and his bail application pending for nearly three years, the High Court denied bail. It only ordered the Trial Court to make an “*earnest endeavour*” to conclude the trial expeditiously, if possibly within six months.

- **Bail amounts**

On bail amounts, the CrPC mandates that the amount of every bond be fixed with “due regards to the circumstances of the case” and “shall not be excessive”.⁴⁶ It is not to be fixed mechanically, according to a schedule keyed to the nature of the charge.⁴⁷

(III) ALTERNATIVES TO PRETRIAL DETENTION

The CrPC does not recognize alternatives to pretrial detention, apart from bail and personal recognizance.⁴⁸ Alternatives such as regular reporting to the police or surrendering of the passport⁴⁹ are often imposed as conditions while granting bail; they are not ordered independently.⁵⁰ The Supreme Court has “suggested” measures such as freezing bank accounts, seizing passports, executing bonds or sureties, and directing the accused to join the investigation or undertake to not visit certain areas as ways of

⁴⁴ The Court said that if the petitioner were to apply for bail, he would be so released on executing a bond to the court’s satisfaction.

⁴⁵ *Ajeet v State of Uttar Pradesh*, 2012 (3) ACR 2636 (Allahabad High Court).

⁴⁶ Section 440, CrPC.

⁴⁷ *Hussainara Khatoon (I) v. Home Secy, State of Gujarat*, (1980) 1 SCC 81.

⁴⁸ **Section 123(1)** on the **Power to release persons imprisoned for failing to give security** states that, “Whenever the District Magistrate in the case of an order passed by an Executive Magistrate under section 117, or the Chief Judicial Magistrate in any other case is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.”

Furthermore, Form Number 28 of the Second Schedule on Bond and bail-bond on a preliminary inquiry before a police officer and Form Number 47 on Warrant of attachment to enforce a bond expressly talk about recognizance. *See also* Sharma, *supra* note 24, at 129.

⁴⁹ *Vimalben Ajitbhai Patel v Vatslabehn Ashokbhai Patel*, Civil Appeal No. 2003 of 2008, decided by the Supreme Court of India on 14.03.2008; *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v Union of India*, (1994) 6 SCC 731; *Sunil K Sinha v State of Bihar*, (1998) 5 SCC 607.

⁵⁰ Sharma, *supra* note 24, at 170.

reducing arrests. Nevertheless, the Court's suggestion was loosely worded⁵¹ and no action has yet been taken. Furthermore, once arrested, persons can be discharged only on their own bond, on bail or under a Magistrate's special order.⁵²

(IV) ANTICIPATORY BAIL

Anticipatory bail is governed by s. 438 of the CrPC; it was introduced in 1973 with the enactment of the new Code (replacing the British era Code of 1898) to deal with the issue of politically motivated cases being filed to harass people. It allows a person, accused of a non bailable offence and apprehending arrest, to apply for bail in anticipation of the arrest. The Court of Sessions or the High Court directs that such person be granted or denied bail, if they are actually arrested. The section was amended in 2005 to require the Court to consider the following factors while deciding the bail application:

- the nature and gravity of the accusation;
- the antecedents of the applicant including any record of previous imprisonment on conviction;
- the possibility of fleeing from justice; and
- whether the accusation has been made with the object of injuring or humiliating the applicant by having them so arrested.

While passing an order under this section, the Court can impose conditions it deems reasonable, such as travel bans; the payment of bail bonds; or presence at interrogation.⁵³

The Supreme Court held that s. 438 is an extraordinary provision requiring a prudent exercise of judicial discretion, although it can be granted for offences punishable with life imprisonment.⁵⁴ In 2011, the Court revisited this decision clarifying that the provision is

⁵¹ At para 128 in *SS Mhetre v State of Maharashtra*, (2011) 1 SCC 694, the Court observes "In case, the State considers the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner." [*Emphasis mine*].

⁵² Section 59, CrPC.

⁵³ **Section 438 on anticipatory bail** states that: "1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

.....

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

.....

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including -

.....

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1)."

extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases.”
[*Emphasis supplied*]

The Court further held that once anticipatory bail is granted, it remains available till the end of the trial, unless new material; changed circumstances; or abuse of their liberty by the accused compel cancellation of the bail.⁵⁵

(V) EXTRAORDINARY LAWS

Preventive detention is an extraordinary power that permits the *preventive* arrest of a person to maintain public order, national defence, and India’s relations with other countries; or to prevent a breach of security. It has been authorized under Article 22(3) of the India Constitution.⁵⁶ Persons who are preventively detained are not entitled to protections such as being informed of the grounds of arrest, consulting a lawyer of their choice or being produced before a Magistrate within 24 hours; however, there are other constitutional safeguards.

Various national and state preventive detention laws have been enacted such as the Armed Forces Special Powers Act, the National Security Act or the Conservation of Foreign Exchange and Prevention of Smuggling Activities (COFEPOSA) Act. Section 151 of the CrPC also facilitates preventive detention by empowering the police to preventively arrest persons to prevent the commission of cognizable offences.

⁵⁴ Gurbaksh Singh Sibbia v State of Punjab, (1980) 2 SCC 565.

⁵⁵ SS Mhetre v State of Maharashtra, (2011) 1 SCC 694.

⁵⁶ Article 22 of the Constitution on Protection against arrest and detention in certain cases states that,
“(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

.....

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose

(7) Parliament may by law prescribe

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention....”

Part VIII of the CrPC allows the Magistrates to order “suspected persons”, “habitual offenders” and others to execute bonds (with or without sureties) for “keeping the peace” or “for good behavior”.⁵⁷ Magistrate can detain such persons for six months, pending inquiry as to the truth of information, which may be proved by “evidence of general repute or otherwise”.⁵⁸ Moreover, if this person is unable to furnish the required security), they can be imprisoned up to a maximum of *three* years.⁵⁹

(VI) LEGAL AID PROVISIONS

Legal aid in India is governed by ss. 12 and 13 of the National Legal Services Authorities (“NALSA”) Act; it clarifies that *any* person in custody, any member of a Scheduled Caste or Tribe, any woman or child is entitled to “free legal services”. Eligible candidates also include those with annual incomes below Rs. 100,000 (approximately \$1660), although in the Supreme Court the limit is Rs. 125,000 and in some States it is only Rs. 50,000.⁶⁰

NALSA has supplemented the Act with the *Quinquennial Vision Document of 2010* directing District Legal Service Authorities (“LSAs”) to run legal aid clinics in prisons and improve legal literacy; the *Paralegal Volunteers Scheme* to train paralegals to work as intermediaries between the people and the LSAs; and the *NALSA Regulations of 2010*.

The legal services referred to in the NALSA Act involve providing a lawyer; paying court (and other incidental) fees; preparing for the appeal, including obtaining certified copies of court orders, printing and translations fees; and pre-litigation settlement including mediation.⁶¹ In the famous 26/11 terrorism trial of Md. Kasab,⁶² the Supreme Court in 2012 clarified the scope of legal aid and when the accused is entitled to a lawyer. Rejecting the argument that the right to be defended by a lawyer crystallizes only at the commencement of trial, the Supreme Court made the following observations:

Mr. Subramaniam contends that Article 22(1) merely allows an arrested person to consult a legal practitioner of his choice and the right to be defended by a legal practitioner

⁵⁷ Sections 107, 109 and 110 of the CrPC

⁵⁸ Section 116, CrPC.

⁵⁹ **Section 122 (1)(a)** of the CrPC states that, “If any person ordered to give security under section 106 or section 117 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or, if, he is already in prison, be detained in prison until such period expires or until within such period he gives the security to the Court or Magistrate who made the order requiring it.....”

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, and after giving the concerned person a reasonable opportunity of being heard, may pass such order on the case as it thinks fit:
Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.”

⁶⁰ National Legal Services Authority (“NALSA”), *Right to Information*, <lawmin.nic.in/rti/nalsa-rti.doc>; Human Rights Law Network, *National Consultation on Prison Legal Aid*, April 2013, <<http://www.hrln.org/hrln/prisoners-rights/reports/1351-national-consultation-on-prison-legal-aid-13th-a-14th-april-2013-new-delhi.html>>.

⁶¹ NALSA, *supra* note 60.

⁶² Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v State of Maharashtra, (2012) 9 SCC 234.

crystallizes only at the stage of commencement of the trial in terms of Section 304 of the Code of Criminal Procedure. We feel that such a view is quite incorrect and insupportable.

482. As noted in *Khatri (II)* as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the magistrate....

484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate.

485. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation

The Court's rationale was that unlike the United States, statements made to the police during interrogation are not admissible in trial in India.⁶³ Hence, the presence of a lawyer is not a pre-requisite during interrogation, unlike when the person is arrested and produced before the Magistrate within 24 hours. Nevertheless, the Supreme Court limited the scope of its own statement when it observed that the failure to provide a lawyer at the pre-trial stage (unlike at trial) does not automatically vitiate the trial; this would depend on the facts of the case.

In another decision in 2012, the Court clarified that the NALSA Act does not distinguish between the trial and appellate stage while providing free legal aid to a person prosecuting or defending a case.⁶⁴ Other important Supreme Court decisions preceding the NALSA Act include the famous *Hussainara Khatoon* case where the Court held free legal services to be an inalienable element of a "reasonable, fair and just procedure" for an accused under their constitutional right to life and personal liberty. This right inheres in every accused person who is unable, due to poverty, to engage a lawyer and the State is mandated to provide free legal services if "the needs of justice so require".⁶⁵ Subsequently in *Khatri (II) v. State of Bihar*,⁶⁶ the Supreme Court ruled that the right to free legal aid is only meaningful if Judicial Magistrates' are obliged to inform the accused of their entitlement to legal

⁶³ Section 162 of the CrPC on **Statements to police not to be signed: Use of statements in evidence** states, "(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872) and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

⁶⁴ *Rajoo v State of Madhya Pradesh*, (2012) 8 SCC 553.

⁶⁵ *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*, (1980) 1 SCC 98. The Court referred to Article 39-A of the Constitution.

⁶⁶ (1981) 1 SCC 627.

representation at State cost. In *Sheela Barse*,⁶⁷ the Supreme Court recommended that details about the pretrial detainees “must” be sent to the Legal Aid Committee, separating the details of men and women so as to guarantee legal aid for female prisoners.

B. Practice

(I) BAILABLE AND NON-BAILABLE OFFENCES

The above section delineated the various laws and judicial directives, which emphasize the exceptionality of bail as a pretrial measure; however, this has not translated into practice. For instance, in 2007, the Supreme Court took *suo motu* action after reading newspaper reports about Jagjivan Ram Yadav, who was in jail for 38 years without trial. Accused of murder, he spent all his time between the prison and mental asylum till he was 70 years, after which the Supreme Court released him on bail.⁶⁸ This is similar to the story of Machang Lalung, who spent more than 54 years in prison, part of which was in psychiatric custody.⁶⁹

Even if these cases are outliers, they are illustrative of the breakdown in the pretrial detention system as will be demonstrated below. Over the last two decades, the absolute number, and in many cases the proportionate percentage, of pretrial detainees has increased (see Table 3).

Table 4: Number of pretrial detainees by period of detention at the end of the year, 1995-2012

Year	Up to 3 months	3-6 months	6-12 months	1-2 years	2-3 years	3-5 years	Above 5 years
1995	155,461 (89.4%)			13,327 (7.7%)	2832 (1.6%)	1966 (1.1%)	255 (0.1%)
2000	78,316 (40.4%)	43,799 (22.6%)	34,419 (17.8%)	22,488 (11.6%)	9629 (5%)	4152 (2.1%)	824 (0.4%)
2004	88,007 (40.5%)	42,403 (19.5%)	39,649 (18.3%)	28,023 (12.9%)	11,272 (5.2%)	5707 (2.6%)	2069 (1%)
2010	91,007 (37.9%)	52,917 (22%)	43,535 (18.1%)	30040 (12.5%)	13948 (5.8%)	6992 (2.9%)	1659 (0.7%)
2012	96,207 (37%)	56,306 (22.1%)	44,954 (17.6%)	31,564 (12.4%)	15,092 (5.9%)	8706 (3.4%)	2028 (0.8%)

Source: NCRB, Prisons Statistics India (2012), Chapter 6, Table 6.1⁷⁰

⁶⁷ *Sheela Barse v Union of India*, (1983) 2 SCC 96.

⁶⁸ *After 38 years in jail, man starts life at 70*, TIMES OF INDIA, 23rd April, 2006, <<http://timesofindia.indiatimes.com/india/After-38-years-in-jail-man-starts-life-at-70/articleshow/1500343.cms>>.

⁶⁹ Parwini Zora, *Fifty Four Years in Jail without Trial: The Plight of Prison Inmates*, COUNTER CURRENTS, 26th August 2005, <<http://www.countercurrents.org/hr-zora260805.htm>>.

⁷⁰ Although not expressly clarified, it seems from the report that the categorization in the intervals includes the end points of the time period. Thus, the 3-5 year period is reported as lodging prisoners “beyond 3 years and up to 5 years”, with those “above 5 years” being counted separately.” A person detained for 6 months should, therefore, be included in the 3-6 month period.

Unfortunately, these figures also include children who are in prison on account of their mothers being in pretrial detention. In *RD Upadhyay v State of Andhra Pradesh*,⁷¹ the Supreme Court took note of the practice of arresting female prisoners, and then automatically arresting their children. Based on various affidavits submitted, there were 6496 female pretrial detainees, with 1053 children; and 1873 convicted female prisoners, with 206 children. The Court passed directions that a child shall not be treated as a pretrial detainee while in prison with their mother; however, female prisoners are allowed to keep their children with them in prison, till they reach the age of six years. As per the 2012 NCRB report, there are 1813 children under the age of six years, living as prison inmates with their mothers across the country.

Table 5: Details of pretrial detainees released or transferred, 2004-2012

Year	Acquitted	Released on appeal	Released on bail	Transferred to other states	Other releases	Extradition	Total releases/transfers
2004	74,022 (6.4%)	41,996 (3.6%)	956,696 (82.7%)	39,138 (3.4%)	41,405 (3.6%)	3461 (0.3%)	1,156,718
2010	71,560 (5.2%)	41,792 (3.1%)	1,216,280 (89%)	3059 (0.2%)	32,824 (2.4%)	7	1,365,522
2012	76,083 (5.3%)	61,330 (4.3%)	1,265,500 (88.2%)	2842 (0.2%)	29,119 (2%)		1,434,874

Source: NCRB, Prisons Statistics India (2012), Table 4.6

Note: Data for 2000 was not disaggregated on the basis of pretrial detainees and convicts and hence has not been used.

Although the figures seem to suggest that a vast majority of persons are released on bail every year, they do not indicate the year in which these persons are arrested. Thus, we cannot say for how long each of the 88.2% detainees released on bail in 2012 were in prison. Similarly, the fact that 5.3% were acquitted in 2012 does not mean that the remaining 94.7% were convicted. The table merely disaggregates data on the number of persons released at the end of the year.⁷²

(II) EXTRAORDINARY LAWS

A quick look at the NCRB Prison Statistics for 2012 reveals that along with 254,857 pretrial detainees, there were 1922 “detenués”, or those held in custody under preventive detention.⁷³ However, this figure only records the number of prisoners at the end of the year, and not the total number of persons arrested under various national and state preventive detention laws or under Chapter VIII of the CrPC.

Thus, the NCRB’s focus on end of the year data does not reveal the number of pretrial detainees who move in and out of prison over the period of the year. For instance, in the

⁷¹ 2007 (15) SCC 337.

⁷² Although the NCRB does not expressly clarify, “acquitted” here presumably also includes those who were in pretrial detention pending appeal and were acquitted by the appellate courts.

⁷³ NCRB, Prison Statistics India (2012), Table 1.3.

run up to the national elections in 2014, the Gujarat Election Commission, with the help of the State police, made 186,460 preventive arrests of “potentially dangerous” persons under the CrPC.⁷⁴ The Commission further issued 52,649 non bailable warrants against “notorious and dreaded criminals, who are yet to be nabbed.”⁷⁵ In 2012, during the State elections, the Commission had identified 2000 “potential trouble makers”, who were required to furnish bonds with undertakings and put 5000 people in preventive detention. Similarly, in 2010, the Madhya Pradesh police arrested 8000 “anti-social elements” to ensure law and order in the run up to the controversial Supreme Court Ayodhya verdict.⁷⁶

Pertinently, individuals who have been preventively detained are not covered by bail laws; hence, they cannot be released on bail.⁷⁷ Nevertheless, the Supreme Court has ruled that apprehension of being granted bail does not justify a preventive detention order.⁷⁸

(III) LEGAL AID PROVISIONS

Although national level data on the reach and effectiveness legal aid could not be found, the high prevalence of pretrial detention (despite legislative amendments) is indicative of the difficulty in accessing legal aid. Anecdotal evidence exists as well; the former Director General of Prisons in Kerala, Mr. Alexander Jacob, estimates that 20% of prison inmates are innocent and are in pretrial detention due to “lack of access to legal aid.”⁷⁹ Although, NALSA has directed State LSAs to visit prisons to build legal awareness and run legal aid clinics, this has not been uniformly implemented.⁸⁰ For instance, Amnesty International found that five of the eleven nominated legal aid lawyers in Bangalore’s Central Prison had *never* visited in 2.5 years. Similarly, three of the six lawyers nominated by the Bangalore Rural District LSA visited only once or twice in 2013.⁸¹

UNDP in its needs assessment of several LSAs reached similar conclusions. It found that many NALSA directions had not been implemented; these included having a

⁷⁴ Press Trust of India, *1.86 lakh persons under preventive arrest ahead of polls*, THE INDIAN EXPRESS, 28th April, 2014, <<http://indianexpress.com/article/cities/ahmedabad/1-86-lakh-persons-under-preventive-arrest-ahead-of-polls/>>.

⁷⁵ Press Trust of India, *Lok Sabha Elections 2014: '1.86 lakh persons under preventive arrest ahead of Gujarat polls*, 27th April, 2014, <http://articles.economicstimes.indiatimes.com/2014-04-27/news/49437673_1_gujarat-polls-state-election-commission-country-made-liquor>.

⁷⁶ Press Trust of India, *8,000 anti-socials arrested ahead of Ayodhya verdict*, 27th September, 2010, THE HINDUSTAN TIMES <<http://www.hindustantimes.com/india-news/bhopal/8-000-anti-socials-arrested-ahead-of-ayodhya-verdict/article1-605286.aspx>>.

⁷⁷ Mrinal Satish, *Bad Characters, History Sheeters, Budding Goondas and Rowdies: Police Surveillance Files and Intelligence Databases in India*, 23(1) NATL. L. SCHOOL OF INDIA REV. 133, 143 (2010).

⁷⁸ *Yumman Ongbi Lembi Leima v State Of Manipur*, (2012) 2 SCC 176.

⁷⁹ Human Rights Law Network, *supra* note 60.

⁸⁰ UNDP, *Needs Assessment Study of the Legal Services Authorities in the States of Madhya Pradesh, Jharkhand, Bihar, Uttar Pradesh, Odhisha, Rajasthan and Chhattisgarh*, Government of India and Multiple Action Research Group (2012), <<http://www.in.undp.org/content/dam/india/docs/DG/needs-assessment-study-of-selected-legal-services-authorities.pdf>> at 132; National Legal Services Authority, 1 NEWSLETTER (2010).

⁸¹ Amnesty International, *Karnataka's undertrials suffer due to faulty prison systems*, 20th July, 2014, <<http://436a.in/karnatakas-undertrials-suffer-due-to-faulty-prison-systems/>>; Divya Gandhi, *65% of prisoners in undertrials*, THE HINDU, 23rd July, 2014, <<http://www.thehindu.com/news/national/karnataka/65-of-prisoners-in-india-are-undertrials/article6238717.ece>>.

panel lawyer and paralegal at every LSA front office, designating panel lawyers as retainers, building a strong base of paralegal volunteers and instituting monitoring committees and reporting requirements.⁸²

The 13th Finance Commission in 2010 approved a grant of Rs. 5000 crore (approximately \$830 million) for improving “justice delivery”, of which Rs. 200 crore (approximately \$ 33.2 million) was earmarked for improving legal aid coverage over the next five years.⁸³ Hence, inadequacy of funds is not an issue, under-utilization is. Even before the Finance Commission grant, S. Muralidhar in his book *Law, Poverty and Legal Aid* in 2004 noted that there was an under-utilization of legal aid funds and no requirement of accountability.⁸⁴

IV. Analysis: Understanding the disjuncture between law and practice

Progressive changes were made to the law in India in 2005, with the introduction of plea-bargaining and amendments to the CrPC requiring the release of pretrial detainees on the completion of certain duration in custody.⁸⁵ In 2008, with an aim of avoiding unnecessary arrests, a further amendment was made to emphasize the importance of investigation before arrest. Notwithstanding this, as evidenced below, the absolute number of pretrial detainees has been increasing:

Table 6: Annual and biennial changing prisoner and pretrial detainee numbers in India, 2004-2012

Year	Number of prisoners	Number of pretrial detainees	PTD/imp (% of prison population)
2004	331,391	217,130	65.5%
2005	358,120	237,076	66.2%
2006	373,271	245,244	65.7%
2008	384,753	257,928	67.04%
2010	368,998	240,098	65.1%
2012	385,135	254,857	66.2%

Source: NCRB, Prison Statistics India (2012), Tables 2.1 and 3.2.

As the Supreme Court observed in 2012:

We find no flaws in the provisions in the statutes books, but the devil lurks in the faithful application and enforcement of those provisions. It is common knowledge, of which we

⁸² UNDP-MARG, *supra* note 80, at 131.

⁸³ 13th Finance Commission, *Chapter 12: Grants in Aid*, Government of India, 2010-2015, <http://fincomindia.nic.in/writereaddata%5Chtml_en_files%5Coldcommission_html/fincom13/tfc/Chapter12.pdf>, at 220-221.

⁸⁴ S. Muralidhar, *Law, Poverty and Legal Aid* (2004).

⁸⁵ The 2005 amendments modified s. 436 of the CrPC (relating to bailable offences) and introduced s. 436A (stipulating a maximum time period for which a person could be detained). In 2008, s. 41 of the CrPC was amended, and further amended in 2010, to try and reduce the incidence of arrests.

take judicial notice, that there is a great hiatus between what the law stipulates and the realities on the ground in the enforcement of the law.⁸⁶

This section will examine the possible reasons for this situation. It will focus on the functionaries of the criminal justice system (the police, prosecutors, the Judiciary, and prison officials); and the socio-economic profile of the pretrial detainees, manifest in the ignorance about their rights; inability to pay bail bonds; and to effectively access legal aid. The analysis should be read keeping in mind that causation cannot always be easily established and not all hypothesis are empirically verifiable. In several situations therefore, I have made an argument, based on my own experience and speculation.

A. Police

(I) CORRUPTION

As per a Transparency International household survey conducted in 2002, the police are the most corrupt institution in India; 100% of the 5157 respondents experienced corruption while interacting with the police.⁸⁷ A major source of police corruption stems from their powers to arrest.⁸⁸ Even from personal experience, I can narrate how police officers often do not register a First Information Report (“FIR”),⁸⁹ unless they are paid a petty bribe. This is despite India, Pakistan, and Bangladesh requiring the police to record FIRs to formally launch the investigation process.

During an internship at the National Judicial Academy in Bhopal, Madhya Pradesh in 2008, I was interviewing police officers to understand the causes for delays in the 30 oldest cases in the Chief Judicial Magistrate’s Court. The common story, which emerged was that these officers were understaffed, overworked, and underpaid; they lived on meagre salaries of Rs. 8000- Rs. 10,000 (approximately \$132- \$165) per month and thus, resorted to corruption. Conversations with police officers revealed four types of existing corruption, of which only the final one was considered taboo:

- *Nazrana*: money paid for future work, to keep the police in good books.
- *Shukrana*: money paid to show appreciation for the work already done by them.
- *Hakrana*: money paid to do the present work. E.g. “If I help you, I want Rs. 5000.
- *Zabrana*: when the police start negotiating, say “Rs. 5000 not enough, I want Rs. 10,000 to do your work”.

It is important to bear in mind that this might not be representative of the type or cause of corruption in the rest of Bhopal, or throughout the country.

⁸⁶ Mohammed Ajmal Md. Amir Kasab @ Abu Mujahid v State of Maharashtra, (2012) 9 SCC 234, at para 476.

⁸⁷ Transparency International, *Corruption in South Asia: Insights & Benchmarks from Citizen Feedback Surveys in Five Countries*, December 2002, <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan019883.pdf>>, at 33.

⁸⁸ *Arneesh Kumar v State of Bihar*, Criminal Appeal No. 1277 of 2013, decided on 02.07.2014; *Joginder Kumar v State of Uttar Pradesh*, (1994) 4 SCC 260 citing the Third Police Report.

⁸⁹ An FIR is a complaint lodged to describe the commission of a cognizable offence. To understand more about FIRs see Commonwealth Human Rights Initiative, *FIR*, <<http://www.humanrightsinitiative.org/publications/police/fir.pdf>>.

(II) POOR RESOURCE ALLOCATION AND WORKING CONDITIONS

As part of my interviews, I realized that junior police officers receive low salaries and no transportation allowance to enable them to investigate a crime, or serve summons on a witness.⁹⁰ This impedes the efficacy of their investigation. Simultaneously, they face external pressure from their superiors to *keep* the crime rates “low” in their jurisdiction; this contributes to their reluctance to register FIRs, especially for petty matters.

A bigger problem, however, emerges from the fact that there is no formal separation of the investigatory and security functions of the police. As the police officers in Bhopal explained, their administrative and security duties left them with less time to solve cases. Instead of investigations, they were called to maintain law and order; provide VIP security; and stop unlawful assemblies, by using their preventive arrest powers. In fact, the Bureau of Police Research and Development (“BPR&D) in its 2012 Report noted while there was only *one* police officer for 761 people, there were *three* police officers for every “protected person” (ministers, members of Parliament and State Assemblies, judges, bureaucrats).⁹¹

This simple fact has big implications – delay in investigation leads to delay in the conclusion of trial; however, the police are quick to arrest persons to demonstrate the (un)successful progress of their investigation. As we shall see below, often the people who are arrested are poor, vulnerable and on a police list (or “history sheet”) of suspected criminals. They are ignorant about their rights; do not have access to a legal aid lawyer; and stay in prison despite the liberal provisions of the law, because no one keeps track of their legal status, or the time spent in detention.

The police in each State keep a record of these anti-social or dangerous elements. For instance, the Karnataka Police Manual states that a “history sheet” should be maintained with the names of all those residing within the permanent or temporary jurisdiction of the police station who “are known or are believed to be addicted to or aid, or abet, the commission of crime... *irrespective of whether they have been convicted or not.*”⁹² [*Emphasis supplied*] In practice, once these persons get on a police list, they are under constant surveillance; get arrested when the police exercise their powers to preventively detain, or even when the police are looking for suspects for a crime committed in that area.⁹³ Considering the

⁹⁰ Transportation allowance refers to the money paid to the police officers for fuel costs or for other modes of transportation used to go to the house of an accused or a witness to serve summons, or to travel to the crime scene for investigation.

⁹¹ As per the Report, there is one police officer for 761 persons, against a sanctioned strength of one officer for 568 persons. Conversely, there are 47,557 officers guarding 14,842 protected persons. See Bureau of Police Research & Development (“BPR&D), *Data on Police Organization in India*, Ministry of Home Affairs, 2012, <<http://bprd.nic.in/showfile.asp?lid=1047>>, at 3, 112. See also Zee Media Bureau, *Police to people ratio: 3 cops for every VIP but just 1 for 761 commoners*, DAILY NEWS & ANALYSIS (DNA), 25th August, 2013, <<http://www.dnaindia.com/india/report-police-to-people-ratio-3-cops-for-every-vip-but-just-1-for-761-commoners-1879695>>

⁹² Rule 1052(1), Karnataka Police Manual.

⁹³ For further details see Satish, *supra* note 77, at 143.

prevalence of corruption and bribery, it is easy to understand why a majority of the pretrial detainees come from lower socio-economic backgrounds.

(III) MISUSE OF THE POWERS OF ARREST

Arbitrary arrests and prolonged judicial custody are common in India, especially in areas marked with political unrest.⁹⁴ In *Joginder Kumar v State of Uttar Pradesh*,⁹⁵ a three Judge Bench of the Supreme Court referred to the Third National Police Commission Report, which states that 60% of police arrests are either “unnecessary or unjustified” and that such unjustified action (and continued detention) accounts for 43.2% of the jail expenditure. A majority of the arrests are for “very minor prosecutions” and are therefore, not as necessary for crime prevention. More importantly, the report concludes that the power of arrest is one of the chief sources of corruption in the police.

To put this in context, three out of the five times a police officer starts an investigation; arrests a person; files a charge sheet; and takes them to court, when the person should not have been arrested in the first place. It is helpful to look at the NCRB figures to get a better sense of the problem. Arrests are made both for offences under the IPC such as murder, rape, cheating, robbery etc.; and under the SLL for offences related to drugs, gambling, customs and excise.

Table 7: Total number of arrests for IPC and SLL crimes, 1995-2012

Year	Number of persons arrested	Remarks
1995	7,229,051	3.4% increase in IPC crimes and 2% increase in SLL crimes over 1994
2000	6,622,505	2.9% increase in IPC crimes and 7% increase in SLL crimes over 1999
2004	7,317,839	6% increase (although a big drop of 6.9% happened between 2002 to 2003) in IPC crimes and 6.4% increase in SLL crimes over 2003
2010	7,789,937	3.4% increase in IPC crimes and 1.2% decrease in SLL crimes over 2009
2012	7,420,091	3.9% increase in IPC crimes and 3.8% decrease in SLL crimes over 2011

Source: NCRB, Crime in India (2012), Tables 12.1, 12.5 and 12.8.

Based on the data, on average 1.1 person was arrested per SLL case in 1995, 2004, 2010, 2012 and 1.2 in 2000. For IPC crimes, the average number of persons arrested per case went from 1.5 (1995, 2000 and 2004) to 1.3 (2010) to 1.4 (2012).

However, the above table masks the phenomenal increase in the number of arrests for crimes committed under the IPC, and that data has been disaggregated below:

⁹⁴ R.K. Saxena, *Catalyst for Change: Effect of Prison Visits on Pretrial Detention in India*, Open Society Justice Initiative, Spring 2008, <http://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf> at 60.

⁹⁵ (1994) 4 SCC 260.

Table 8: Total number of arrests for IPC crimes, 1995-2012

Year	Persons arrested	Remarks
1995	2,587,739	a) Highest number (19.8%) of arrests were for riots, then hurt (13.8%) b) 3.2% arrests were for murder and 3% for attempt to commit murder
2000	2,675,923	a) Highest number (17%) of arrests were for hurt, then riots (16.1%) b) 2.9% arrests were for murder and 2.8% for attempt to commit murder
2004	2,660,910	a) Highest number (17%) of arrests were for hurt, then riots (10.8%) b) 2.5% arrests were for murder and 2.5% for attempt to commit murder
2010	2,947,122	a) Highest number (18.4%) of arrests were for hurt, then riots (12.6%) b) 2.1% arrests were for murder and 2.2% for attempt to commit murder
2012	3,270,016	a) Highest number (17.5%) of arrests were for hurt, then riots (10.6%) b) 2.1% arrests were for murder and 2.5% for attempt to commit murder

Source: NCRB, Crime in India (2012), Table 12.1

The Supreme Court has repeatedly castigated the police for “irrational and indiscriminate arrests” which constitute a gross violation of human rights.⁹⁶ In a July 2014 judgment, the Court criticized the police’s (mis)use of arrest powers and the failure of Magistrates to check it.⁹⁷ It observed that this arresting power contributes to a sense of “arrogance” and a “lucrative sources of police corruption”; it results in the police arresting people without conducting an investigation or applying their mind. Despite laws prohibiting routine arrests on mere allegations or accusations,⁹⁸ the Court noticed no improvement. In fact, in its “experience”, the Supreme Court found that “*detention is authorised in a routine, casual and cavalier manner*,” and that Magistrates often fail to adequately scrutinize the reasons for arrest. These observations were made in light of the high number of arrests (197,762 in 2012) and low levels of conviction (15%) of offences under the IPC relating to cruelty against a woman by her husband or his relative.⁹⁹ Consequently, the Court directed police officers to not automatically arrest the accused and to comply with the amended CrPC, or face departmental action or contempt proceedings.

Unfortunately, this practice of arbitrary arrests also speaks to the larger problem of pretrial detention in India; the ever-increasing number of arrests and hence, persons incarcerated, overcrowds prisons; makes them unmanageable; and is not compensated by the number of pretrial detainees being released on bail. The situation is exacerbated once we examine the demographic profile of those arrested. For instance, during my interviews with police officers in Bhopal, they openly agreed to implicating persons under “minor” offences such as the Arms Act, justifying it as arresting “regular criminals” with previous convictions, who were anyway “a menace to society”. The usual caveats about the usefulness of extending my findings to the entire country obviously apply. However, it reveals the long-

⁹⁶ SS Mhetre v State of Maharashtra, (2011) 1 SCC 694.

⁹⁷ *Arnesh Kumar v State of Bihar*, Criminal Appeal No. 1277 of 2013, decided on 02.07.2014.

⁹⁸ Sections 41 and 41A of the CrPC which were amended in 2008 and 2005 respectively.

⁹⁹ Section 498A of the IPC.

term consequences of being a convict beyond merely the term of imprisonment; convicts are more likely to be listed in police “history sheets”, to be arrested when the public wants demonstrable results, and to be denied bail given their previous criminal record.

(IV) SHORTAGE OF POLICE OFFICERS

The above sub-sections have characterized the police as often being corrupt, arbitrary, inefficient and apathetic. However, these attributes are partly a consequence of the absolute shortage of police officers in the system; this impedes efficient investigation, results in adjournments due to absence during trial, and in the Indian context, non-production of the accused before the Magistrate.¹⁰⁰ As per the latest statistics, the rate of police personnel per 100,000 population is described below:

Table 9: Current police personnel numbers and police-population ratios in South Asia

South Asian Countries	Total Police Personnel	Rate per 100,000 population
Bangladesh	139,546 (2013)	89.1
India	1,580,311 (2010)	131.1 with only 12.5 women officers per 100,000 females
Pakistan	354,221 (2011)	204.05
Nepal	56,064 (2006)	218.7
Sri Lanka	63,984 (2004)	324.2

Source: Network for Improved Policing in South Asia (“NIPSA”) (for Bangladesh);¹⁰¹ United States Institute for Peace (for Pakistan);¹⁰² and UNODC (for India, Nepal, Sri Lanka)¹⁰³

Note: Police personnel include those whose primary function in public agencies is the prevention, detection and investigation of crimes. This excludes support staff such as secretaries and clerks.

As is evident, India (along with Bangladesh) has one of the lowest police-population ratios in the world; 131.1 against a UN norm of 222 per 100,000 population.¹⁰⁴ Thus:

Table 10: Current Strength of the Indian police force compared to its sanctioned strength and the UN norm

Actual practice	1 officer per 761 people
Bureau of Police’s own norm	1 officer per 568 people
UN norm	1 officer per 450 people

¹⁰⁰ Section 167 of the CrPC requires the accused to be presented before the Magistrate to facilitate a decision on the extension of their custody. But since police officers are not available to escort the accused to the court, in practice, Magistrates routinely extend the remand period without hearing the accused. (See Saxena, *supra* note 94, at 60)

¹⁰¹ NIPSA figures are used for Bangladesh. See National Institute of Policing for South Asia, *Bangladesh* <<http://www.nipsa.in/bangladesh>. The UNODC figures for Bangladesh are only available until 2006 and record that the total strength of the police force was 123,197 officers, with 85 police personnel per 100,000 population.

¹⁰² Hassan Abbas, *Reforming Pakistan’s Police and Law Enforcement Infrastructure: Is it too Flawed to Fix?*, United States Institute of Peace, 2011, <<http://www.usip.org/sites/default/files/resources/sr266.pdf>>, at 6. The population for 2011 is taken as 173.59 million as per UN estimates. This means that the number of police men per 100,000 population is 204.05.

¹⁰³ UNODC, *supra* note 18.

¹⁰⁴ M. Shamshur Rabb Khan, *Poor Policing and Weak Intelligence Gathering*, Institute for Peace and Conflict Studies, 10th October 2007, <<http://www.ipcs.org/article/india/poor-policing-and-weak-intelligence-gathering-2391.html>>.

Source: Bureau of Police Research & Development¹⁰⁵ and Daily News and Analysis¹⁰⁶

The above figures hide the low level of female officers in the country; in 2011 only 5% of the total police force comprised female police constables,¹⁰⁷ despite India's high incidence of rapes. Even otherwise, the law requires that female officers arrest women accused, or require the presence of a female officer during interrogation of a female accused; this might explain the low level of female pretrial detainees.

More importantly, the above figures are silent on the intra-country distribution, which is more inequitable. For instance, in Bihar, the ratio of police to population is 67 per 100,000.¹⁰⁸ Given that Bihar also has the highest prison official to inmate ratio and prison officer vacancies (as described below), it is unsurprising that it has the second largest number of pretrial detainees amongst all States. With 24,389 detainees out of 254,857 total; it is second only to Uttar Pradesh and has 9.5% of the total pretrial detention population.¹⁰⁹ Below, Table 11 compares the pretrial detention rates amongst different States, and attempts to demonstrate a correlation between those figures and the population of each State; the number of crimes recorded; the number of people arrested; and the strength of the police force in the country.

¹⁰⁵ BPR&D, *supra* note 91.

¹⁰⁶ BPR&D, *supra* note 91; and DNA, *supra* note 91.

¹⁰⁷ Malvika Vyawahare, *India's Police Force Lags Much of the World*, NEW YORK TIMES, 16th January, 2013, <<http://india.blogs.nytimes.com/2013/01/16/india-has-one-of-the-lowest-police-population-ratios-in-the-world/>>.

¹⁰⁸ NCRB Crime Data 2012, Table 17.5.

¹⁰⁹ NCRB, Prison Statistics India, 2012, Table 3.2.

Table 11: Intra-state comparison of the number of pretrial detainees, incidence of violent crime, number of arrests, police-population ratios and sanctioned and actual strength of prison officials in India, 2012

State	Number of pretrial detainees	Estimated mid-year population (in thousands)	Number of PTD as a proportion of population*	Incidence of violent crime (% of all India violent crimes)**	Violent crime as a % of total cognizable IPC crimes	Persons arrested under Indian Penal Code crimes (% contribution)	Persons arrested under Special and Local Laws (SLL) crimes (% contribution)	Total cases (IPC and SLL) for investigation (including pending from previous year)	Existing police population ratio (extra)***	No of police per 100,000 population	No of IPC cases per police officer	Jail officers (% actual to sanctioned strength)
Uttar Pradesh	53,821 (21.1%)	205,426	0.0261%	33,824 (12.3%)	17.1%	412, 811 (12.6%)	1,701,298 (40.99%)	1,858,747 (25.99%)	1173 (621)	89	1.7	70%
Bihar	24,389 (9.5%)	99,457	0.025%	29,842 (10.8%)	20.4%	264,570 (8.1%)	23,539 (0.57%)	253,212 (3.5%)	1456 (323)	67	4.3	21.1%
Madhya Pradesh	17,619 (6.9%)	73,730	0.024%	15,228 (5.5%)	6.9%	343,857 (10.5%)	146,524 (3.5%)	337,720 (4.7%)	962 (82)	104	4.1	92.2%
West Bengal	13,977 (5.5%)	90,595	0.015%	22,361 (8.1%)	13.9%	177,722 (5.4%)	15,379 (0.3%)	270,851 (3.8%)	1658 (471)	98	3.8	72.8%
Maharashtra	16,426 (6.4%)	114,697	0.014%	26,972 (9.8%)	13.3%	309,672 (9.5%)	180,896 (4.3%)	496,930 (6.9%)	829 (215)	162	1.8	77.2%
Kerala	4165 (1.6%)	34,882	0.012%	14,902 (5.4%)	9.4%	209, 344 (6.4%)	386,864 (9.3%)	555,197 (7.8%)	962 (82)	130	4.9	80.17 %
Gujarat	6613 (2.6%)	60,062	0.011%	7652 (2.8%)	5.9%	182,284 (5.6%)	278,270 (6.7%)	403,866 (5.6%)	1021 (450)	114	2.8	47,12 %
Andhra Pradesh	8551 (3.4%)	85,744	0.009%	12,431 (4.5%)	6.5%	246,395 (7.5%)	72,104 (1.7%)	328,632 (4.6%)	953 (311)	113	3.1	72.6%
All India average or total	254,857	1,213,370		275,165		3,270,016	4,150,075	7,150,502	761 (193)	138	2.5	66.3%

Source: NCRB Crime data (2012), Tables 3.1, 12.3, 12.7 and 17.5; NCRB Prisons data (2012), Tables 3.2 and 11.1; Bureau of Police Research & Development (2012), Table 1.1

* The number of pretrial detainees as a proportion of population was calculated by dividing the number of pretrial detainees in each State with the total population of the State. The States are arranged in decreasing order of this column.

** Violent crime comprises murder, attempt to murder, culpable homicide not amounting to murder, rape, kidnapping, dacoity (including preparation and assembly), robbery, riots, arson and dowry death. The NCRB only defines these crimes as IPC crimes and does not include those under SLL.

***Police population ratio describes the number of individuals for every police officer. The Bureau of Police Research & Development assigns a different ideal number or sanctioned strength for every State and compares the actual police strength with the sanctioned strength. Thus, the number in brackets (marked as “extra”) is the number by which the actual strength is below the sanctioned strength. For instance, in Uttar Pradesh, there are currently 1173 persons for every police officer. However, the sanctioned strength is 552 persons per police officer. Thus, 621 is the number by which the actual strength falls short of the sanctioned strength.

Uttar Pradesh has the highest proportion, 14.4% (4,966 out of 34,434) of total murder cases and Bihar has the highest proportion, 15.5% (5452 out of 35,138), of total attempt to murder cases.

B. Prosecutors

During my work in Bhopal, I found the absence of the Public Prosecutor another source of delay; a fact attributable to the severe shortage in the number of prosecutors appointed by the government. Interviewing various prosecutors revealed that each Assistant Public Prosecutor was individually responsible for up to 3 courts, despite not having access to a proper office; computer facilities; support staff; or interns. Unfortunately, these findings are not limited to Madhya Pradesh.

The Delhi High Court *suo motu* examined the appointments and working conditions of public prosecutors in March 2014. The *amicus* pointed out that the prosecutors' allowance to purchase laptops did not include payment for internet facilities and legal databases; they did not have exclusive office space in courts; and they kept losing files because of insufficient file space.¹¹⁰ Regarding the appointments, the Court made the following observation, while directing the State to have a back up of 10% of the strength in every district:

One of the pre-dominant cause(s) for delay in disposal of criminal case is due to shortage of public prosecutors. It is quite shocking to learn that some of the public prosecutors have been burdened to take care of the work of two criminal courts. This lackadaisical and apathy of the Government in not filling up of the vacancies on the posts of Assistant Public Prosecutors/Additional Public Prosecutors is quite intriguing and appalling.

It is a matter of great concern that for the timely appointment of public prosecutors, this court has to give directions from time to time to GNCT of Delhi.¹¹¹

The office of the Prosecutor in India (similar to Pakistan and Bangladesh) is not a prestigious office as in the United States. Often, it is often a neglected department, not staffed by the young, bright, ambitious lawyers. Prosecutors' incentives to engage with the system, collaborate with the police (since they do not have independent investigatory powers);¹¹² cooperate with the Magistrates; and review the case of the accused are low. Furthermore, they are appointed and transferred by the Executive, and can be susceptible to political interference. At the trial court level, prosecutors work under the District Magistrate's jurisdiction, instead of the Director of Prosecutions heading the State prosecution department. India does not have a concept of police prosecutors.

C. The Judiciary

(I) BACKLOG IN THE JUDICIAL SYSTEM

Delays in the criminal justice system originally prompted the 2005 amendments mandating the release of indigent persons accused of bailable offences within a week, and specifying

¹¹⁰ *Court on its own motion v State*, Criminal Writ Petition 1549/2009 decided by the Delhi High Court on 14.03.2014.

¹¹¹ *Id.*

¹¹² However, they provide legal services and opinions to the Central Bureau of Investigation. See UNAFEI, *The Relationship of the Prosecution with the Police and Investigative Responsibility*, 107th International Training Course: Reports of the Course, <http://www.unafei.or.jp/english/pdf/RS_No53/No53_29RC_Group1.pdf> at 309

the maximum period for which persons could be detained pending trial.¹¹³ The underlying rationale was that the delay in the conclusion of criminal trial, coupled with the police predilection to arrest poor and vulnerable persons, was resulting in many innocent (and helpless) persons spending a lot of time in pretrial detention. Unfortunately, despite various judicial directives, legislative amendments, government reports and policies, the situation has not improved.

India has a current backlog of over 30 million cases, with 64,330 cases pending before the Supreme Court as of 1st April, 2014.¹¹⁴ As per the National Court Management Systems Report, nearly 30% of the cases in 2011 were more than five years old. Its “most conservative estimate” is that the next three decades will see the number of cases shoot up to 150 million, requiring 75,000 judges, against the 2011 sanctioned strength of 18,871 judges.¹¹⁵

To address this ever-increasing problem of backlog, the Law Commission of India in its 120th Report as far back as 1987 recommended increasing the judge-population ratio from 10.5 to 50 judges per million of population.¹¹⁶ The Supreme Court followed up on this and in 2002 in *All India Judges’ Association v Union of India* recommended a similar increase to 50 judges per million of population within five years.¹¹⁷ However, in 2010, the judge-population ratio was only 10.5 per million of population¹¹⁸ which has now increased to between 13 to 15.5 per million of population.¹¹⁹ This can be compared to Germany’s ratio of 45 judges per million and France’s ratio of 80 judges per million population.¹²⁰ As the 2013 Parliamentary Committee Report on the Empowerment of Women noted, India’s average is dismal compared to an average of 50 judges per million of population in developed countries and between 35-40 in developing countries.¹²¹

¹¹³ Sections 436 and 436A of the CrPC referred to above.

¹¹⁴ Supreme Court of India, *Summary: Types of Matters in Supreme Court of India as on 01.04.2014*, <http://www.supremecourtfindia.nic.in/p_stat/pm01042014.pdf>.

¹¹⁵ Supreme Court of India, *National Court Management Systems: Policy and Action Plan*, September 2012, <<http://supremecourtfindia.nic.in/ncms27092012.pdf>>, at 5.

¹¹⁶ Law Commission of India, *120th Report on Manpower Planning in the Judiciary: A Blueprint*, 1987, <<http://lawcommissionofindia.nic.in/101-169/Report120.pdf>>, at 3.

¹¹⁷ (2002) 4 SCC 247, at para 25.

¹¹⁸ Planning Commission of India, Department of Justice, REPORT OF THE WORKING GROUP FOR THE TWELFTH FIVE YEAR PLAN (2012-2017), (September 2011), <http://planningcommission.gov.in/aboutus/committee/wrkgrp12/wg_law.pdf>, at 4.

¹¹⁹ Different numbers are cited: the Parliamentary Committee on Empowerment of Women (*supra* note 16) and the Tribune (R.D. Sharma, *Justice Barred*, THE TRIBUNE, 13th March, 2012, <<http://www.tribuneindia.com/2012/20120313/edit.htm#6>> cite the figure of 13 per million and the Hindu (Press Trust of India, *Judge-population ratio lowest in the country: CJI*, THE HINDU, 3rd March, 2013, <<http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/judgepopulation-ratio-lowest-in-india-cji/article4470825.ece>> and Gulf News (IANS, *Judge-population ratio grossly inadequate: PM*, GULF NEWS, 7th April, 2013, <<http://gulfnews.com/news/world/india/judge-population-ratio-grossly-inadequate-pm-1.1167796>> cite the figure of 15/15.5 judges per million.

¹²⁰ International Monetary Fund (“IMF”), *Pakistan: Poverty Reduction Strategy Paper* (2010), <<http://www.imf.org/external/pubs/ft/scr/2010/cr10183.pdf>>, at para 12.8.3.2.

¹²¹ Parliamentary Committee on Empowerment of Women, *supra* note 16, at para 2.8.

Nevertheless, increasing the sanctioned judge-population ratio will have no effect as long as judicial vacancies continue to remain a problem. At the beginning of 2014, the situation is as follows:

Table 12: Court wise breakdown of judicial vacancies in India, 2012-13

Court	Sanctioned Strength	Working Strength	Vacancies
District and Subordinate Courts	19,238	14,942	4296
High Courts	906	640	266
Supreme Court	31	29	02
Total	20,175	15,611	4564

Source: Supreme Court of India¹²²

The Judiciary thus needs to examine other solutions such as court and case management to solve the underlying causes of delay, rather than simply focussing on the more visible and expensive infrastructural changes of increasing courtrooms and appointing judges. Before that, however, the courts have to focus on writing better judgments while deciding bail applications. Too often courts grant bail without considering the economic circumstances of the accused. This leads to a strange situation wherein the accused, though legally granted bail, cannot be released on such; matters being made worse by the lack of action and coordination by prison officials. To these issue, we now turn.

D. Prison Officials

Prison officials are one of the most important, and often the most neglected, components of the pretrial detention system.

Given that prisons in India is a State subject,¹²³ the administration of prisons varies across States and depends to a great extent on the State's budget, official strength, training of prison officials and the commitment of the current Inspector General of Prisons. For instance, the 2012 NCRB Prisons Statistics reveals a wide variation in actual and sanctioned strength of prison staff. Thus, Bihar only has 21.1% of the sanctioned officials; Jharkhand has 36.8%; while Madhya Pradesh has 92.2%; with the all India average being 66.3%. Similarly, both Bihar and Jharkhand have the highest number of inmates per jail official (21 each, against a national average of 9). Interestingly, Uttar Pradesh had only one correctional officer for the 80,311 inmates.¹²⁴ Table 11 illustrates some of these figures and their correlation with the number of arrests, crimes, and police officials in determining the number of pretrial detainees in each State.

Often therefore, it is apathy or overwork, rather than corruption or malice, which results in many cases falling through the cracks. Stories, such as that of Shamsuddin Fakruddin

¹²² Supreme Court of India, *supra* note 15.

¹²³ The Constitution divides matters into Union Lists, State Lists and Concurrent Lists based on which entity (the Centre or the States) has jurisdiction to legislate on those matters. Prisons are on the State list and criminal law on the Concurrent list.

¹²⁴ NCRB, Prison Statistics 2012, Table 11.1.

spending one year in prison for stealing Rs. 200 (approximately \$4) because he could not furnish the bail bond of Rs. 10,000 in property (\$167), (despite the law stipulating that indigence should not prevent persons from being released on bail), are not uncommon.

The success of an accused being able to benefit from the amendments to the CrPC *vides* ss. 436 (on the release of an indigent person when they cannot afford bail) and s. 436A (release after spending certain time in custody) depend on them being able to successfully take their case before the court. In practical terms then, this depends on the availability of lawyers; the effectiveness of the state or district legal aid system; the ability and willingness of the prison officials to keep track of the legal status, including time in custody, of each prisoner; and the capacity of the accused, including an awareness about their rights.

E. Ignorance about rights

As indicated above, many of those in pretrial detention are repeat arrestees; they are arrested simply because the police have them on a list or history sheet. Given their poverty, lack of influence and ignorance, it is hard for them to complain or bribe their way out of being arrested. Amnesty India’s work with pretrial detainees in Karnataka confirms that most pretrial detainees are not aware about their rights and the recent amendments to the law.¹²⁵ The narrative of a majority of India’s pretrial detainees being poor and from weaker sections of society is based in hard facts, as the NCRB data below demonstrates:

Table 13: Educational qualifications of pretrial detainees, 2000-2012

	Illiterate	Below Class X	Class X to below Graduate	Graduate	Post Graduate	Holding a tech degree or diploma
2000	80,168 (41.4%)	70,639 (36.5%)	32,506 (16.8%)	7534 (3.9%)	2238 (1.2%)	542 (0.3%)
2004	83,572 (38.5%)	89,000 (40.98%)	33,984 (15.6%)	7936 (3.7%)	1690 (0.8%)	948 (0.4%)
2010	78,836 (32.8%)	102,098 (42.5%)	44,594 (18.6%)	10,232 (4.3%)	2893 (1.2%)	1445 (0.6%)
2012	76,626 (30.1%)	110,385 (43.3%)	49,871 (19.6%)	12,459 (4.9%)	3471 (1.4%)	2045 (0.8%)

Source: NCRB, Prison Statistics India (for the relevant year), Table 5.2

Thus, in 2012, 73.4% of the pretrial detainee population was illiterate or had studied below Class X. Being uneducated, or poorly educated; many of them do not know their rights.

However, it is not merely education, but social status which plays a huge role in determining who gets arrested, who gets released, and how quickly. As both the tables below reveal, those from minority religions (Muslims) and lower castes (Schedule Castes, Schedule Tribes – or “untouchables”, and Other Backward Classes) are disproportionately represented in the pretrial detention population, compared to their proportion in the overall population.

¹²⁵ Divya Gandhi, *supra* note 81.

Table 14: Religious affiliations of pretrial detainees, 2000-2012

Years	Hindu	Muslim	Sikh	Christian	Others
2000	124,717 (64.4%)	48,229 (24.9%)	7172 (3.7%)	6015 (3.1%)	7494 (3.9%)
2004	151,119 (69.6%)	48,917 (22.5%)	8177 (3.8%)	7248 (3.3%)	1669 (0.8%)
2010	167,813 (69.8%)	53,312 (22.2%)	8686 (3.6%)	7198 (2.99%)	3089 (1.3%)
2012	178,119 (69.9%)	53,638 (21%)	10,128 (3.97%)	8929 (3.5%)	4043 (1.6%)

Source: NCRB, Prison Statistics India (for the relevant year), Table 5.2

Note: Based on Pew Research Data in 2012, Muslims constituted 14% of the total population.¹²⁶ In 2001, per the Indian census, 80.5% of the population was Hindu, 13.4% were Muslim, 1.9% were Sikh and 2.3% were Christian.¹²⁷ In 2011, the census data did not release the official breakdown of religion.

Table 15: Breakdown of the pretrial detention population based on caste, 2000-2012

Year	Scheduled Castes	Scheduled Tribes	Other Backward Classes (OBCs)	Others (General Category)	Total no (for which data available)
2000	43,056 (23.4%)	25,063 (13.6%)	54,628 (29.7%)	61,218 (33.3%)	183,965
2004	44,470 (21.6%)	25,073 (12.2%)	55,080 (26.8%)	81,033 (39.4%)	205,656
2010	50,960 (21.96%)	29,709 (12.8%)	70,123 (30.2%)	81,219 (35%)	232,011
2012	57,197 (22.4%)	33,900 (13.3%)	75,723 (29.7%)	88,037 (34.5%)	254,857

Source: NCRB, Prison Statistics India (for the relevant year), Table 5.2

Persons belonging to Scheduled Castes and Tribes (“SC/STs”) have been historically disadvantaged and are “untouchables” as part of Hinduism’s caste system. The 2011 census showed that together they form around 25% of India’s population (16.6% Scheduled Castes and 8.6% Scheduled Tribes); however, they comprise more than a third (35.7%) of the pretrial detention population. This is unsurprising consider the social norms and the fact that more than 60% of the SC/ST population does not participate in any economic activity.¹²⁸ OBCs are other backward classes who are also historically (socially and economically) disadvantaged but are not on the list of SC/STs. The government does not

¹²⁶ Pew Research, *The Global Religious Landscape: Muslims*, Pew Research Religion and Public Life Project (2012), <<http://www.pewforum.org/2012/12/18/global-religious-landscape-muslim/>>.

¹²⁷ Government of India, *Religious Composition*, Census Data 2001, <http://censusindia.gov.in/Census_Data_2001/India_at_glance/religion.aspx>.

¹²⁸ Express News Service, *SCs, STs form 25% of population, says Census 2011 data*, THE INDIAN EXPRESS, 1st May 2013, <<http://archive.indianexpress.com/news/scs-sts-form-25--of-population-says-census-2011-data/1109988/>>.

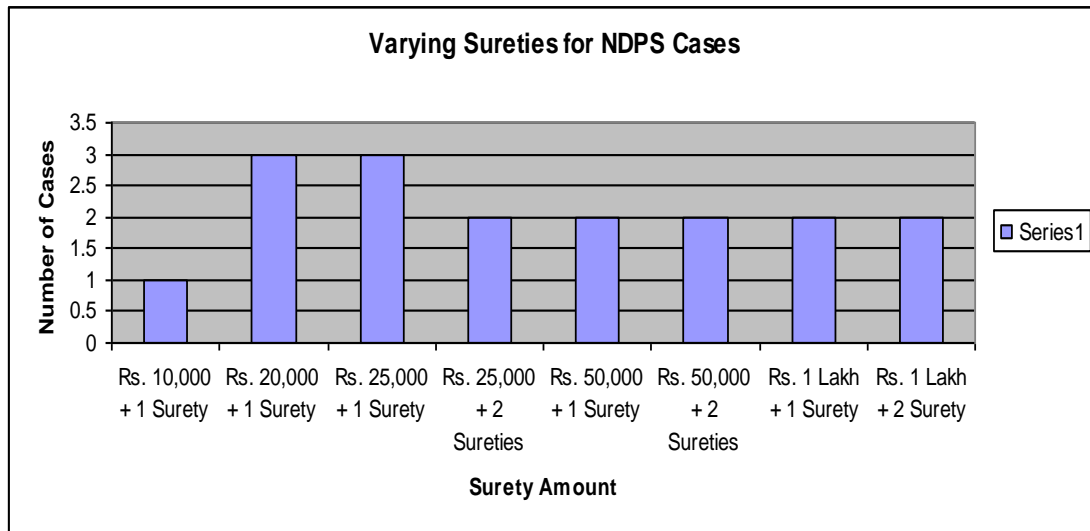
collect caste data and hence, it is not possible to have an official estimate of their population. Overall though, it is much harder for these lower classes to be released on bail than the rest of the population.

F. Inability to pay the bail bonds

In many cases, pretrial detention is caused by the inability of the accused to pay the high bail bond imposed by the court.¹²⁹ Unfortunately, this is despite the 2005 amendment to the CrPC for bailable offences¹³⁰ and various Supreme Court directives¹³¹ on this issue for non-bailable offences. Courts often seem to mechanically fix the amounts of the bail bonds; they rarely, if ever, give reasons for ordering the specific amount, and do not direct attention to the economic circumstances of the accused. It is difficult, if not impossible, to estimate the number of persons unable to pay the bond; the bail order only specifies the bail amount and the fact of inability can only become clear after the order or if a subsequent application is filed. Data on this is not officially tabulated.

In a research project during my undergraduate law degree, I empirically examined 105 High Court decisions on bail petitions for four specific offences – under the Narcotics and Psychotropic Substances Act, s. 498A of the IPC dealing with cruelty, cheque bouncing and theft under the Electricity Act. Of the 30 NDPS cases, bail was granted in 17 cases and the following was the distribution of bail bonds levied:

Graph 1: Varying bail bond amounts for cases under the Narcotic Drugs and Psychotropic Substances Act



¹²⁹ Stanley Pinto, *Amnesty India mulls bail fund to rescue undertrials*, THE TIMES OF INDIA, 8th January 2014, <<http://timesofindia.indiatimes.com/india/Amnesty-India-mulls-bail-fund-to-rescue-undertrials/articleshow/28528191.cms>>.

¹³⁰ Section 436A was amended in 2005 and provided for the release of a person accused of a bailable offence on the payment of bail. The amendment stipulated that any indigent person (defined as someone “unable to give bail within a week of the date of his arrest”) “shall” be released on the execution of a bond without sureties for his appearance.

¹³¹ In *Moti Ram v State of Madhya Pradesh*, (1978) 4 SCC 47, the Supreme Court criticised the lower court practice of imposing bail bonds with onerous conditions such as high amounts or the requirement of a local surety.

Interestingly, there were five cases, pertaining to similar fact situations and decided by the same sitting judge of the Delhi High Court, where different surety amounts were imposed, ranging from Rs. 20,000 to Rs. 100,000.¹³² The High Court did not allude to the economic circumstances or professions of the accused in any of these cases, making it difficult to understand the rationale behind the amount of the bond considering the similarity in facts.

This practice assumes importance once we examine the income levels of those in prison – although this data is not available in the NCRB reports, Tihar Jail, India’s central jail records the income levels of all its prisoners. Even though it has not been disaggregated on the basis of convicts and pretrial detainees, it is still informative given that the vast majority (74.8%) of Tihar inmates are pretrial detainees. The data below shows that a vast majority of the prisoners in this central prison come from poor families – nearly 77% of the prison population earns less than Rs. 50,000 (or \$830) annually and only 8% earns more than Rs. 100,000 or \$1666 annually.

Table 15: Central Jail (Tihar Jail) breakdown of pretrial detainees on the basis of income at the end of 2012

Annual income grade (INR)	Male	Female	Total (%)
Grade A (Up to 10,000)	2191	96	2287 (21%)
Grade B(10,001-30,000)	2072	237	2309 (21.2%)
Grade C(30,001-50,000)	3680	87	3767 (34.7%)
Grade D(50,001-100,000)	1591	59	1650 (15.2%)
Grade E(100,001-200,000)	641	19	660 (6.1%)
Grade F(200,001-400,000)	117	7	124 (1.1%)
Grade G(400,001-Above)	59	0	59 (0.5%)
	10,351	505	10,856

Source: Government of Delhi¹³³

Note: Grade A, or Rs.10,000 is approximately \$167; Grade B is approximately between \$170-\$500; Grade C is approximately between \$500-\$830; Grade D between \$830-\$1666; Grade G is above \$6665.

Such prisoners are often unable to furnish the requisite bail bond and hence remain in prison, despite having been granted bail. Amnesty India has identified the inability to

¹³² *Ram Narayan v State*, MANU/DE/0837/2005; *Rahul Saini v State*, MANU/DE/9097/2006, *Ansar Ahmed v State*, MANU/DE/1088/2005; *Rajinder Gupta v State*, (2006) CriLJ 64 (Del); *Mahesh Pal Singh v State*, MANU/DE/8764/2006.

¹³³ Delhi Government, Prisoner Profile: Tihar Central Jail, <http://www.delhi.gov.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile>.

afford bail as an important explanation of the large number of pretrial detainees and is in the process of setting up a “bail fund” to help these people.¹³⁴

Unfortunately, there is no data to understand the prevalence of this phenomenon and comparing the number of pretrial detainees with those who remain in prison due to an inability to pay the bail bond. In such situations, the role of the prison officials assumes importance; along with the legal aid boards, they can keep a regular watch over the legal status of pretrial detainees to ensure timely release on completion of a certain amount of prison time or the inability to furnish the bail bond for a bailable offence.

G. Inability to effectively utilize the legal aid provisions

As Human Rights Law Network notes, the efficient functioning of the legal aid system is hampered by:

the inaccessibility of the poor to lawyers, an almost absent pro-bono culture, the complexity of the system, the inordinate delays, the lack of adequate legal training, corruption and a failure to implement the law.¹³⁵

Part of the problem is that District Legal Service Authorities are overworked and understaffed; they are expected to identify, and provide legal aid, to the needy and vulnerable clients; organize *Lok Adalats* (“peoples’ courts”) under the NALSA Act;¹³⁶ and monitor the implementation of various government schemes, such as to eradicate child labour.¹³⁷ Furthermore, unmet infrastructure needs and inexperienced financial managers impede LSAs functioning.¹³⁸ Although funding is not an issue, most lawyers get paid only Rs. 500 (approximately \$8.5), which is insufficient to motivate them to work hard.¹³⁹

Secondly, there is insufficient public awareness about the existence and authority of the LSAs; often all the participants in legal awareness camps are lawyers.¹⁴⁰ UNDP found that “nearly all” of the 532 women interviewed from the lower economic strata “had no idea” about the functions of LSAs, “most of them” had not even heard about LSAs.¹⁴¹ Thus, as Muralidhar posits, the shift towards the institutions providing legal services instead of focusing on the beneficiaries needs to be rectified.¹⁴²

¹³⁴ Pinto, *supra* note 129.

¹³⁵ HRLN, *supra* note 60.

¹³⁶ Lok Adalats are an alternative dispute resolution mechanism that are governed by the Legal Services Authorities Act, 1987 and the National Legal Services Authority (Lok Adalat) Regulations, 2009.

¹³⁷ *Government funds not used for student welfare: Court*, TIMES OF INDIA, 9th July, 2011 <<http://timesofindia.indiatimes.com/city/chennai/Govt-funds-not-used-for-student-welfare-Court/articleshow/9157095.cms?referral=PM>>.

¹³⁸ A UNDP study on the needs assessment study of various LSAs found that many of the Taluk and District level LSAs lacked telephones, computers, vehicles and support staff (including for accounts). UNDP-MARG, *supra* note 80, at 131.

¹³⁹ UNDP-MARG, *supra* note 80, at 5.

¹⁴⁰ UNDP-MARG, *supra* note 80, at 132.

¹⁴¹ UNDP-MARG, *supra* note 80, at 6.

¹⁴² Muralidhar, *supra* note 84.

Finally, there is no monitoring system in place – there is no case tracking system to check the progress of a legal aid case, District and Taluk level LSAs are not informed about the outcome of a case, and reporting obligations between the paralegals and the LSAs and amongst the various levels of LSAs are not being followed.¹⁴³ This adversely affects incentive systems and the ease in accessing legal aid.

V. Solutions and Recommendations

In India, laws, government policies, and judicial directives exist to facilitate the release of prisoners in pretrial detention. For instance, prisons are required to establish Periodic and Undertrial Review Committees to meet monthly to review the status of pretrial detainees; legal aid boards are required to provide free legal aid and assist these Committees in ensuring that no one stays in prison longer than absolutely necessary. The problem, as Amnesty India and Commonwealth Human Rights Initiative (“CHRI”) found in their report on the functioning of these committees in Karnataka¹⁴⁴ and Rajasthan¹⁴⁵ respectively lies in implementation. Even talking to lawyers in India who work on these issues, there is huge variance amongst prisons depending on the proactive nature of the legal aid board and the genuine concern of the Inspector General of Prisons. Thus, the answer lies not just in broad, larger scale reform (such as increasing the number of judges, jail officials, police officers); but also in collecting data and monitoring the implementation of these problems.

Pretrial detention, as an issue in India, has not generated a lot of interest, access or collaboration amongst NGOs or across the political spectrum. Advocacy might be a better tool to ensure it gets media attention and becomes politically salient; merely legislating or litigating on the issue is not going to solve the problem. For instance, requiring Magistrates to periodically visit prisons to review cases and rule on them ignores the reality of overworked and understaffed Magistrates, who often lack the incentive to fulfil their duties. Or the fact that legal aid lawyering is not attracting the best and the brightest today because of the realities of litigation being a poorly paid profession and young lawyers not attracted to the paltry compensation offered by the government. To rely just on the good will and intentions of the different players of the criminal justice system is to continue, and often exacerbate, the problem.

Other than that, some of the solutions, which are being tried out, are described in brief below.

A. Institutionalizing prison visits

CHRI used an official prison visitors program to visit 22 prisons in Chhattisgarh, 26 in Rajasthan and 27 in Madhya Pradesh between 2001 and 2005. Their prognosis was that

¹⁴³ UNDP-MARG, *supra* note 80, at 131.

¹⁴⁴ Divya Gandhi, *supra* note 81.

¹⁴⁵ Commonwealth Human Rights Initiative, *Undertrials: A Long Wait to Justice*, A Report on Rajasthan’s Periodic Review Committees (2011), <http://www.humanrightsinitiative.org/publications/prisons/UndertrialsPRCReport_2013.pdf>.

regular prisons visits would enable better coordination amongst the various functionaries of the criminal justice system; facilitate monitoring and evaluation; and ensure implementation of deadlines. These prison visits were combined with holding courts in prison, ensuring legal aid and more police personnel to escort the accused. CHRI officials submitted reports of their prison visits to the State governments and conducted training workshops, advocating for better local and policy coordination. Although no causality is attributable, they found that the proportion of pretrial detainees in the prison population is amongst the lowest in the states they worked in; namely, Rajasthan, Chhattisgarh and Madhya Pradesh. The declining trend is below.¹⁴⁶

Table 16: Number of pretrial detainees in Rajasthan, Chhattisgarh and Madhya Pradesh, 2001-2003

State	2001	2002	2003
Rajasthan	8737	7322	6584
Chhattisgarh	4921	4961	4128
Madhya Pradesh	16,837	15,635	13,993

B. Improving access to lawyers

Piecemeal reform in ensuring access to legal aid lawyers is taking place at the behest of individual or district initiatives. This is best illustrated by the actions of the prison superintendent in Harsul Central Prison in Aurangabad, Maharashtra who plans to form a legal aid cell to help the 1600 inmates lodged in a 600 capacity prison. The legal aid cell will include lawyers, retired prison officials and be run with the help of NGOs to “offer free service to needy inmates” who are unable to pay for legal services. The prison authorities estimate this will reduce the number of pretrial detainees who comprise more than 2/3 of the prison population.¹⁴⁷ Similarly, in Trichy, Kerala, the Central Prison recently set up the first legal aid clinic in the state, which is to be manned by lawyers and paralegal volunteers to give legal assistance and advice.¹⁴⁸ Various law schools have legal aid clinics, although there is little collaboration amongst them or with the government.

Based on a needs assessment study of various Legal Services Authorities conducted with the Indian government in 2012, the UNDP recommended instituting a systematic empanelling process for lawyers, ensuring diversity of representation; providing further training for lawyers and paralegals; and introducing monitoring and evaluation mechanisms.¹⁴⁹ It identified best practices from Delhi and Haryana which include:

- training programme for empaneled lawyers and paralegals;

¹⁴⁶ Saxena, *supra* note 94, at 67.

¹⁴⁷ *Prison authorities to form a legal aid cell*, TIMES OF INDIA, 17th June, 2014, <<http://timesofindia.indiatimes.com/city/aurangabad/Prison-authorities-to-form-legal-aid-cell/articleshow/36691135.cms>>.

¹⁴⁸ *Free legal aid clinics for undertrials adopted*, TIMES OF INDIA, 27th March, 2014, <<http://timesofindia.indiatimes.com/city/trichy/Free-legal-aid-clinic-for-under-trials-inaugurated/articleshow/32749947.cms>>.

¹⁴⁹ UNDP-MARG, *supra* note 80.

- internship programmes and student literacy missions;
- assistance to rape victims and appointment of women lawyers under a Model Scheme for Legal Aid Prosecution Counsel for victims of crimes against women and children;
- video conferencing facilities and toll free helplines; and
- legal empowerment schemes through legal awareness and legal assistance by LSA lawyers sitting in “Gender Resources Centres” to help people on health, sanitation and other issues.

In Delhi, legal aid is provided through “jail visiting advocates” who visit the pretrial detainees and then report to the legal aid cells. They are assisted by three types of paralegals; community paralegals, helping the GRCs; student paralegals; and jail inmate paralegals, helping other inmates on legal issues. The system seems to work.¹⁵⁰

C. Improving access to judges and courts

The Maharashtra Prison department has decided to reduce the problem of pretrial detention by using Skype to resolve the problems of non-production of the accused (due to the low number of police escorts available to take them to court). The Department was earlier using video-conferencing facilities that linked 54 prisons and 146 courts and resulted in over 10,000 pretrial detainees being heard. However, the project faced problems due to the high telephone bills and problems of load shedding. A pilot project linking the Arthur Road and Taloja prisons via Skype has recently been completed and is considered a success, speeding the conclusion of trial.¹⁵¹

Conversely, in Bihar, “camp courts” have been set up in prison to ensure judges visit prisons, and in cases involving minor offences, give rulings on the spot. This is seen as a useful alternative to the more formal, proceduralist legal system. In fact, in Malawi, officials were encouraged by this system and created a similar structure facilitating Magisterial visits. They found that the word “court” was creating difficulties because of the perception that cases were tried and disposed away from public view. Therefore, they started terming these camp courts “prison screening sessions”¹⁵² It was exactly this concern which led CHRI to heavily criticize the work of these so-called “*jail adalats*” (court prisons) in India,¹⁵³ after their initial support.¹⁵⁴

¹⁵⁰ This is based on the UNDP report (*supra* note 80) and an interview with a practicing legal aid lawyer.

¹⁵¹ Mustafa Plumber, *Skype to be used by prison department to produce under trials in Mumbai court*, DAILY NEWS & ANALYSIS, 9th March, 2014, <<http://www.dnaindia.com/scitech/report-skype-to-be-used-by-prison-department-to-produce-under-trials-in-mumbai-court-1968122>>.

¹⁵² Penal Reform International, *Index of Good Practices in Reducing Pretrial Detention* (2005), <http://www.penalreform.org/wp-content/uploads/2013/06/man-2005-index-pre-trial-v7-en_0.pdf>.

¹⁵³ CHRI, *Liberty at the Cost of Innocence: A Report on Jail Adalats in India*, (2009), <http://www.humanrightsinitiative.org/publications/prisons/liberty_at_the_cost_of_innocence.pdf>

¹⁵⁴ Saxena, *supra* note 94.

Country Report for Pakistan

I. Country Background

Table 17: Population, economy, administration and criminal justice system figures for Pakistan

Population figures	Numbers
Present population (2013)	182.1 million
Expected population (2050)	271.08 million
Proportion of population under the age of 15 years	35%
Urbanization rate(urban population as a % of total) (2013)(WB) ¹⁵⁵	37%
Economy	
Nominal GDP (US\$) (EII)	246.6 billion
GDP per capita (US\$ at PPP) (EII)	3059
GDP (current US\$)(2013) (WB)	236.6 billion
GNI per capita, Atlas method (current US\$)(2013) (WB)	1380
Gini index (FY 2007-08) (CIA Fact book)	30.6
Administration	
Form of government	Federal parliamentary democracy or federal republic
Number of provinces	4 provinces (Balochistan, Khyber-Pakthunkhwa, Punjab and Sindh); 1 territory (Federally Administered Tribal Areas-FATA) and 1 capital territory (Islamabad)
Judicial system	The Supreme Court is the apex court of the country. Below it are the 5 High Courts, the Federal Shariat Courts and the provincial and district civil and criminal courts. The Federal Shariat Court was created in 1980 to determine whether any law is “ <i>repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet</i> ” (Art 203D)
Criminal Justice System	
Criminal justice tradition	Common law system with Islamic law influence
Hierarchy of criminal courts	Courts at the lowest level called Judicial Magistrates (Magistrates of First, Second, and Third class); this is followed by judges at the Courts of Sessions, High Court and finally, Supreme Court
Number of all crimes reported (2008)	592,503
Number of police officers (2011)	354,221
Number of police officers per 100,000	85

¹⁵⁵ The World Bank calculates this as people living in urban areas, as defined by national statistical offices. It is calculated using World Bank population estimates and urban ratios from the United Nations World Urbanization Prospects.

population (2011)	
Number of judges (sanctioned strength) (2011)	2617
Number of judges per million population (2010)	12

Sources: the CIA World Fact book;¹⁵⁶ the Economist Intelligence Unit;¹⁵⁷ the Kaiser Family Foundation;¹⁵⁸ the National Police Bureau,¹⁵⁹ the International Monetary Fund (“IMF”);¹⁶⁰ the Supreme Court,¹⁶¹ the UN Population Division;¹⁶² and the UN Institute.

For research on Pakistan, I talked to an Assistant Commissioner working in the Pakistani Administrative Service and some practicing lawyers. It should be noted that their views might not be representative of the existing system and should be treated accordingly.

II. Historical trends

Table 18: Changing prisoner and pretrial detainee numbers in Pakistan, 1999-2012

Year	Number of prisoners	Number of pretrial detainees	PTD/imp (% of prison population)	Pre-trial/remand population rate/100,000
1993	68,453			
1996	72,700			
1999	74,485	61,241	77.6%	43
2004	75,859	51,433	67.8%	33
2009	81,408	57,556	70.7%	34
2012	74,987	49,582	66.2%	27

Source: ICPS, World Prison Brief. Despite various efforts, no official government statistics could be found.

Conviction rates in Pakistan, as per the Foundation Open Society Institute- Pakistan (“FOSI”) report, are not believed to be above 10%, although crime rates have continued to increase.¹⁶³ The National Crime Data reviewed the figures from 2008-2013 and found that

¹⁵⁶ CIA World Factbook, at <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html>>; CIA World Factbook, at <<https://www.cia.gov/library/publications/the-world-factbook/geos/pk.html>>.

¹⁵⁷ Economist Intelligence Unit, *Pakistan*, <http://country.eiu.com/FileHandler.ashx?issue_id=921984276&mode=pdf>.

¹⁵⁸ The Henry J. Kaiser Family Foundation, *Population under Age 15 (Percent)*, <<http://kff.org/global-indicator/population-under-age-15/>>.

¹⁵⁹ Data from the National Police Bureau was cited by the Senior Superintendent of the Police, Regional Investigation Branch, Rawalpindi. See Waheed, *supra* note 5, at 139.

¹⁶⁰ IMF, *supra* note 120, at para 12.8.3.2.

¹⁶¹ Dr. Faqir Hussain, *The Judicial System of Pakistan*, Registrar, Supreme Court of Pakistan, 2011, <http://supremecourt.gov.pk/web/user_files/File/thejudicialsystemofPakistan.pdf> at 23.

¹⁶² UN Population Division, *World Population Prospects: The 2012 Revision* <http://esa.un.org/wpp/unpp/panel_population.htm>.

¹⁶³ FOSI does not explain how it arrives at the conviction rate of under 10%, although this figure is independently supported by the International Crisis Group in their report on Pakistan. See Democratic Commission for Human Development and Foundation of Open Society, *Right to fair trial: Journey through criminal justice system in Pakistan* (unpublished, report on file with author) 15.

crime has continually increased at an average of 17.86% compared to 2007 figures.¹⁶⁴ This helps contextualize Pakistan's high proportion of pretrial detainee population.

III. Existing laws and practice

A. Laws and Jurisprudence

(I) INVESTIGATORY PROVISIONS

Article 10(III) of the Pakistani Constitution mandates that the accused must be produced before a judge within a maximum period of 24 hours from the time of arrest.¹⁶⁵ This is reiterated in the Pakistani CrPC, which does not permit the detention of an arrested person beyond 24 hours, unless so authorized by a special order of the Magistrate under s. 167 of the CrPC.¹⁶⁶

Section 167 deals with cases where the investigation cannot be completed within 24 hours and the arrested person has to be produced before a Magistrate. Using this, Magistrates can authorize further detention of the accused for 15 days. However, if the accused is a woman, per s. 167(6), she has to be interrogated in prison in the presence of a jail officer and a female police officer instead of being further detained. Introduced via an amendment in 1994, this provision makes an exception for cases involving women accused of *qatl* or dacoity.¹⁶⁷ Section 173 of the CrPC further states that every investigation shall be completed without unnecessary delay and within 14 days of filing the FIR.

¹⁶⁴ Shakeel Anjum, *Crime Report of Five Years Issued*, THE NEWS, 29th March, 2013, <<http://www.thenews.com.pk/Todays-News-13-21913-Crime-report-of-five-years-issued>>

¹⁶⁵ Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty four hours of such arrest and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

¹⁶⁶ **Person arrested not to be detained more than twenty-four hours.**- No police-officer shall detain in custody a person arrested without warrant for a period longer than, under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

¹⁶⁷ **167. Procedure when investigation cannot be completed in twenty-four hours:** (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded, the officer incharge of the police-station or the police-officer making the investigation if he is not below the rank of the sub-inspector, shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under, this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or [send] it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction;

Provided that no Magistrate of the Third Class, and no Magistrate of the Second Class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police.

[(5) Notwithstanding anything contained in Sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under sub-section (2) is a female, the Magistrate shall not except—in the cases involving QatI or dacoity supported by reasons to be recorded in writing, authorise-the detention of the accused in

(II) BAILABLE AND NON-BAILABLE OFFENCES

- **Bailable offences**

Pakistan follows the Indian practice of classifying offences as bailable and non-bailable. Bailable offences, under s. 496 of the CrPC, are those where the judge or officer in charge of a police station must grant bail. Here, the accused is released on the provision of money bail; or at the court/officer's discretion, at the execution of a bond for personal appearance without sureties.¹⁶⁸ Thus, the only condition liable to be imposed is the demand of security with sureties.¹⁶⁹ Nevertheless, the classification of the offence (as bailable or non-bailable) does not seem to affect the amount of bail bond required. For instance, in *Sikandar v State*,¹⁷⁰ the Karachi High Court released the accused on bail if they furnished one surety of Rs. 200,000 (equivalent to approximately \$2022) and a personal bond in the like amount to the satisfaction of the trial court. As will be shown below, similar bail amounts have been required in the case of non-bailable offences.

- **Non-bailable offences**

Section 497 of the CrPC is the pertinent provision and provides that a person accused of a non-bailable offence shall not be released on bail if there appears "reasonable grounds for believing" that they were guilty of an offence punishable with imprisonment for ten years, life or death. However, if "sufficient grounds for further inquiry exist" or the accused is a child under sixteen years, a woman or sick or infirm, they may be released on bail. Much of the case law in Pakistan has focused on analyzing the evidence to determine when a petitioner falls under the phrase "further inquiry" and is thus, eligible for bail.¹⁷¹ There is consensus however that in the case of non-bailable offences, bail is the rule and not the exception; it can only be denied in "extraordinary and exceptional cases", such as when

police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer.

(7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer incharge of the police station or the police officer making investigation, not below the rank of sub-inspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of the prison in the company of a female police officer appointed by the Magistrate:

Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise].

¹⁶⁸ **496. In what cases bail to be taken:** When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer incharge of a police station or appear or is brought, before a Court, and is prepared at any time while in the custody of such officer or at: any stage of the proceedings, before such Court to give bail, such person shall be released on bail, Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as; hereinafter provided:

¹⁶⁹ <<http://www.zklawassociates.com/wp-content/uploads/2012/03/Right-of-Bail-in-Pakistan1.pdf>>.

¹⁷⁰ 2007 PCrLJ 917 (Karachi High Court).

¹⁷¹ *Abid Ali alias Ali v State*, 2011 SCMR 161 (Supreme Court); *Farooq Mengal v State*, 2007 SCMR 404 (Supreme Court); *Md. Siddique v Imtiaz Begum*, 2002 SCMR 442 (Supreme Court).

there is a likelihood of the accused absconding or tampering with the prosecution evidence or repeating the offence, or where the accused is a previous convict.¹⁷²

In 2011, pursuant to the CrPC (Amendment) Act, a proviso was added to s. 497 stating that the accused “shall” be released on bail if they have been detained:

- continuously for more than a year in case of an offence not punishable with death;
- continuously for more than two years in case of an offence punishable with death.

The amendment reduces these time limits by half for women and makes exceptions when the accused is responsible for the delay; is a “hardened, desperate or dangerous criminal”; is accused of an act of terrorism; or has been previously convicted for an offence punishable with death or imprisonment for life.¹⁷³ The Karachi High Court has held that the burden of proof shifts to the accused to disclaim any responsibility for the delay.¹⁷⁴

The 2011 amendment was applied by the Supreme Court in *Shabeer v State*,¹⁷⁵ where the petitioner had been in custody for nearly four years and there was no reasonable possibility of his trial being concluded in the Sessions Court. Overturning the High Court’s decision, the Supreme Court held that the accused had not been responsible for causing delay in the trial and was thus released on bail, subject to furnishing a solvent surety of Rs. 200,000 (equivalent to approximately \$2022) and a personal recognizance bond in the like amount. However, the Sindh High Court in *Khalid v State*¹⁷⁶ in 2014 took a very strict approach to the interpretation of accused-caused delay, holding that even *one* adjournment requested by the accused would disentitle them to the benefits of the 2011 amendment. More specifically, the Court stated:

¹⁷² *Ghulam Sarwar v State*, 2005 PCrLJ 2004 (Karachi High Court); *Mushtaq Ahmed v State*, 2005 MLD 1298 (Lahore High Court).

¹⁷³ **497. When bail may be taken in case of non-bailable offence:** (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail,

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail-

- (a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or
- (b) Who, being accused of any offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one year and whose trial for such offence has not concluded

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person, who in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

¹⁷⁴ *Abdul Sattar v State*, 2006 YLR 1385 (Karachi High Court).

¹⁷⁵ Criminal PLA No. 84K of 2011, decided on 28.09.2011 by the Supreme Court of Pakistan.

¹⁷⁶ 2014 PCrLJ 437 (Sindh High Court).

... while ascertaining the cumulative effect of delay in the disposal of the case, it would not be merely a mathematical calculation of excluding the adjournments obtained by the accused or his counsel. Mechanism of delay in the trial do[es] not work on the basis of mathematical and mechanical inclusion and exclusion of days.

The Court's rationale was that even "necessary" or "non-deliberate" adjournments may frustrate further hearing dates or "unsettle" the minds of prosecution witnesses for further hearings. Such a strict approach however, penalizes the accused *even when it is not their fault* ("non-deliberate delay"); this may prevent the release of many detainees on bail in the future.

The 2011 amendment has been further used to grant bail in cases of delay in the conclusion of trial within the statutory period, whether for 3.5 years (Rs. 200,00 bond);¹⁷⁷ 2.5 years (Rs. 200,000 and a personal recognizance bond);¹⁷⁸ or more than a year (Rs. 50,00).¹⁷⁹ Bail was granted in all these cases because the Court concluded that the accused had not contributed to the delay in any manner.

Section 382-B requires the court to consider the period of detention the accused has undergone while awarding a sentence of imprisonment.

Section 426 of the CrPC dealing with suspension of sentence pending appeals was amended in 2011 to insert sub-section (1A) requiring an appellate court to release a convicted person on bail:

1. if they are sentenced to three years imprisonment and their appeal has not been decided for six months after their conviction;
2. if they are sentenced to between three and seven years imprisonment and their appeal has not been decided within one year of their conviction; or
3. if they are sentenced to seven years or life imprisonment and their appeal has not been decided within two years of their conviction

The provision however makes an exception if the convict is responsible for the delay; is a "hardened, desperate or dangerous criminal"; or has been accused of an act of terrorism punishable with death or imprisonment for life.¹⁸⁰

¹⁷⁷ *Sufyan v State*, 2014 YLR 422 (Lahore High Court).

¹⁷⁸ *Md. Razzaq v State*, 2014 PCrLJ 655 (Sindh High Court).

¹⁷⁹ *Md. Saleem v State*, 2014 MLD 594 (Lahore High Court).

¹⁸⁰ **Section 426(1A)** states that "An appellate court shall, except where it is of the opinion that the delay in the decision of the appeal has been occasioned by an act or omission of the appellant or any other person acting on his behalf order a convicted person to be released on bail who has been sentenced-

- (a) to imprisonment for a period not exceeding three years and whose appeal has not been decided for a period of six months of his conviction;
- (b) to imprisonment for a period exceeding three years but not exceeding seven years and whose appeal has not been decided within a period of one year of his conviction; or
- (c) to imprisonment for life or imprisonment exceeding seven years and whose appeal has not been decided within a period of two years of his conviction:

Provided that the provisions of the foregoing paragraphs shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person, who in the opinion of the

While seemingly effective, it is hard to attribute the general decline in pretrial detention to the 2011 amendment (given its relatively recent enactment). As will be discussed below, a large part of the story lies in the successful, albeit partial, implementation of the National Judicial Policy (“NJP”) enacted in 2009.

- **Bail amounts**

Section 498 of the CrPC states that the amount of bail bond will be fixed with “due regard to the circumstances of the case” and shall “not be excessive”. Furthermore, the Sessions and High Court can reduce the amount of bail.¹⁸¹

(III) ALTERNATIVES TO PRETRIAL DETENTION

The CrPC does not recognize alternatives to pretrial detention, apart from bail and personal recognizance.

(IV) ANTICIPATORY BAIL

Unlike India, anticipatory bail is not expressly provided for in the law. Nevertheless, the same has been incorporated through judicial decisions through ss. 498 and 498A. The Supreme Court has held that “pre-arrest bail” can be granted when

...arrest being for ulterior motives such as humiliation and unjustified harassment, prosecution motivated by motive so as to cause irreparable injury to reputation and liberty, motivation of Police on political consideration.¹⁸²

Pre-arrest bail is therefore “not a rule”; it is an “extraordinary relief” granted only when the court is satisfied about the *mala fide* of the intended arrest (for instance, on account of ulterior motives) and to prevent the victimization of innocent victims.¹⁸³ Therefore, it is not a substitute or alternative to post-arrest bail.¹⁸⁴ The petitioner must further establish reasonable belief that they are not guilty of the alleged offence (and that further inquiry is warranted); they are not fugitives at law; and do not have any previous criminal records.¹⁸⁵

The CrPC was amended to introduce s. 498A stipulating that only a petitioner in custody or present before the Court can be released on bail, and only in respect of the case registered against them.¹⁸⁶

Appellate Court, is a hardened desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

¹⁸¹ **498. Power to direct admission to bail or reduction of bail:** The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall, not be excessive and the High Court or Court of Session may in any case, whether there be an appeal on conviction or riot, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.

¹⁸² *Yasmin Butt v Majid Baig alias Bobby Pehelwan*, (2008) SCMR 1602; *Murad Khan v Fazal-e-Subhan*, PLD 1983 SC 82.

¹⁸³ *Murad Khan v Fazal-e-Subhan*, PLD 1983 SC 82; *Muhammad Safdar v State*, 1983 SCMR 645

¹⁸⁴ *Rana Md. Arshad v Md. Rafique*, PLD 2009 SC 427.

¹⁸⁵ *Rana Md. Arshad v Md. Rafique*, PLD 2009 SC 427.

¹⁸⁶ **Section 498-A** states that, “Nothing in Section 497, or Section 498 shall be deemed to require or authorise a Court to release on bail, or to direct to be admitted to bail, any person who is not in custody or is not

(V) EXTRAORDINARY LAWS

In July, Pakistan unanimously passed the Pakistan Protection Act of 2014, a new anti-terror law that gives extraordinary preventive detention powers to the intelligence agencies and the army. It allows them to hold suspects up to 60 days, without revealing the location or the allegations against them for vaguely defined “acts threatening the security of Pakistan”.¹⁸⁷ Detention can be extended for a further 30 days on “reasonable grounds” in a “designated internment camp”.¹⁸⁸ The Act reverses the burden of proof and presumption of innocence (even though officials can withhold reasons for arrest);¹⁸⁹ permits shooting suspects on sight with the permission of a Grade-15 official (Clause 3) and establishes separate courts.¹⁹⁰ Only valid for two years, it is possible that the Act may get extended in 2016, unless a constitutional challenge is successfully brought against it.

In Pakistan, the Federally Administered Tribal Areas (“FATA”) region is governed by a special Frontier Crimes Regulation (“FCR”), along with informal justice systems such as the *jirgas*. Under the FCR in FATA and the Provincially Administered Tribal Areas, security forces are permitted to detain terror suspects for a year without charges. Reportedly, many individuals are held indefinitely in preventive detention, without access to a lawyer of their choice and often, without access to family members.¹⁹¹ Worse still, s. 21 of the FCR deals with collective responsibility and blockading of entire tribe; the action of *any* member of the tribe “*in hostile, subversive or offensive manner towards the State or to any person residing within the settled area of Pakistan*” can result in arrest, attachment of property, or denial of access to a settled area to any member of the tribe. The actions are initially targeted against the male descendants of the paternal grandfather of the accused, but can be used against any section of the tribe of the accused. Despite the 2011 amendments excluding the provision’s application against women, children under 16 years and persons over 65 years, the application of collective punishment disregards individual culpability.¹⁹² Worse still, a Political Agent, a federally appointed senior civil bureaucrat, who wields extensive revenue; judicial; and executive powers, takes these actions.¹⁹³

present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or a direction that a person be admitted to bail, shall be effective only in respect of the; case that so stands registered against him and is specified in the order or direction.”

¹⁸⁷ Human Rights Commission of Pakistan (“HRCP”), *State of Human Rights in 2013* (2013), <<http://www.hrcp-web.org/hrcpweb/report14/AR2013.pdf>>, at 37.

¹⁸⁸ Ifthikar Firdous, *Senate passes amended Protection of Pakistan Bill 2014*, THE TRIBUNE, 30th June, 2014, <<http://tribune.com.pk/story/729238/senate-passes-the-protection-of-pakistan-bill-2014/>>.

¹⁸⁹ Clause 15(1) of the Act states, “An enemy alien or militant facing the charge of a scheduled offence on existence of reasonable evidence against him, or a person arrested in preparation to commit or while attempting to commit such an offence shall be presumed to be engaged in waging war or insurrection against Pakistan unless he establishes his non-involvement in the offence.” See <http://www.na.gov.pk/uploads/documents/1404714927_922.pdf> for the text of the Act.

¹⁹⁰ Tribune, *supra* note 188.

¹⁹¹ US State Department, *Pakistan 2013 Human Rights Report*, <<http://www.state.gov/documents/organization/220614.pdf>>, at 17.

¹⁹² *Amendment to the Frontier Crimes Regulation, 1901*, 27th August, 2011, <<http://www.slideshare.net/fatanews/regulation-to-amend-the-frontier-crimes-regulationfcr-august-2011>>

¹⁹³ International Crisis Group (“ICG”), *Reforming Pakistan’s Prison Systems*, Asia Report No 212-October, 2011, <[http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/212%20-%20Reforming%20Pakistans%20Prison%20System.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-asia/pakistan/212%20-%20Reforming%20Pakistans%20Prison%20System.pdf)>, at 3.

Pakistan’s preventive detention laws in the CrPC are similar to India, and require bonds to be furnished to “keep peace” and for “good behavior”.

(VI) LEGAL AID PROVISIONS

Rule 3 of the Pakistan Bar Council Free Legal Aid Rules of 1999 provides for free legal aid to the “poor, destitute, orphan, widows, indigent and other deserving litigants” involved in a specified category of cases including:

- illegal detention;
- abuse of power and authority by the police, law enforcing agency and Executive;
- neglect of duties by Government departments, Local Councils/bodies and local authority/agency; and
- such other cases or category of cases as may be approved from time to time by the Central Committee.¹⁹⁴

Multi-level committees at the national, provincial and district level are enjoined to provide free legal aid “to a deserving person/litigant” on the application by the person on a prescribed form or simple paper, supported by an affidavit and necessary documents including the relevant judgments or orders. Rule 8(b) does not stipulate a time limit within which the applications must be decided, stating only that should happen “as soon as possible”.

The Sindh High Court in 2007 noted that an accused has the right to legal representation “from the very stage of arrest till final disposal”, and this is at State expense if they are “poor, indigent or pauper.”¹⁹⁵ Nevertheless, since this had not been implemented, the Court directed the provincial government to pay lawyers within its jurisdiction to ensure legal assistance to the accused “from the state of remand till final disposal of the cases.”

B. Practice

(I) INVESTIGATORY PROVISIONS

Although s. 173 of the CrPC mandates the completion of investigation and the submission of the *challan* (or the police report) within 14 days of the incident, this is not followed. The Executive Committee Member of the Supreme Court Bar Association and Chairman of Voice of Prisoners, Mr. Noor Alam Khan, observes, “*the investigation agencies have not been following that provision. The guidelines given in the National Judicial Policy have also not been followed by the law enforcing and investigation agencies, which results in delay in disposal of cases.*”¹⁹⁶ The problem, as Mr. Khan points out, is that police officers do not fear recrimination or penalties, and thus, have no incentives to submit their reports on time.

¹⁹⁴ Pakistan Bar Council, *Free Legal Aid Rules, 1999*, <<http://pakistanbarcouncil.org/wp-content/uploads/2012/07/1999.pdf>>.

¹⁹⁵ *Faisal v State*, Special Anti-Terrorism Jail Appeal No. 15 of 2003 decided by the Sindh High Court on 17th August, 2007, at paras 21-22.

¹⁹⁶ Press Correspondent, *Hope shines for prisoners awaiting trial*, THE DAWN, 2nd May, 2011 <<http://www.dawn.com/news/625486/hope-shines-for-prisoners-awaiting-trial-2>>.

The NJP enacted in 2009 (and a brain child of the then Chief Justice Iftikhar Chaudhry) alluded to this problem when it recognized that in case of non-completion of the investigation within 14 days, the police should submit an interim report and “*in such cases, the court shall not grant remand beyond 15 days period.*” Interestingly, in India, the Supreme Court has criticized the practice of submitting interim charge sheets.

(II) BAILABLE AND NON-BAILABLE OFFENCES

Notwithstanding the liberal tone of the judgments referred to above, it is instructive to think about their implementation given the figures below:

Table 19: Current province-wise breakdown of the number of prisoners and pretrial detainees

Region	Prisons	Authorized Capacity	Total inmates	Number of pretrial detainees
Punjab	32	21,527	48,225	31,401 (65.1%)
Khyber-Pakhtunkhwa	22	7982	8139	5217 (64.1%)
Balochistan	11	2585	2862	1288 (45.5%)
Gilgit Baltistan	7	700	266	191 (71.8%)
Total	72	32,794	59,542	38,097 (63.98%)

Source: Human Rights Commission of Pakistan, State of Human Rights, 2013. Authorities in Sindh did not provide any information to the Commission.

These figures also include cases where gross violations of human rights have transpired. For instance, in *Deedar v State*,¹⁹⁷ the accused had been in prison for five years for a crime allegedly committed 14 years ago. During this time no charges were framed, nor were the prosecution witnesses available for trial. Despite various court orders requiring production, he remained in prison (ostensibly because he was awaiting trial in another case). The Karachi High Court thus granted him bail of Rs. 200,000 (equivalent to approximately \$2022) with a personal recognizance bond of similar amount.

Furthermore, nor all courts have consistently followed the Supreme Court’s liberal directives. In *Abdul Sattar v State*,¹⁹⁸ the Karachi High Court held that “*delay in the conclusion of trial is no more a valid ground for grant of bail in a non-bailable offence;*” although unexplained “inordinate delay” amounts to an abuse of process, which can be considered a valid ground.

Non-implementation of laws has been a problem in the juvenile justice system as well. Despite the Juvenile Justice System Ordinance 2000, there are very few special juvenile courts or judges in Pakistan. Section 4 requires courts to decide all juveniles’ cases within four months; although given that there are 1219 juveniles awaiting trial, while only 179 convicted juveniles, this rarely happens.¹⁹⁹ However, it is important to note the

¹⁹⁷ 2007 MLD 466 (Karachi High Court).

¹⁹⁸ *Abdul Sattar v State*, 2006 YLR 1385 (Karachi High Court).

¹⁹⁹ US State Department, *supra* note 193, at 12.

improvement in the situation from 2000 when there were 5000 juvenile prisoners in custody.²⁰⁰

(III) LEGAL AID PROVISIONS

In 2012, the UNDP, along with UNOPS and Insaaf Network Pakistan came out with a report titled *Voices of the Unheard* describing the problems with accessing legal aid in Pakistan.²⁰¹ Based on their research and survey of 10,322 poor households²⁰² in Pakistan, they found the following percentage of people involved in litigation and able to receive “pro-bono assistance for representation before the court”:

Table 20: Province-wise breakdown of the percentage of people receiving legal aid

Name of Province	Percentage of people receiving free legal aid
Punjab	3%
Gilgit-Baltistan	4%
Khyber-Pakhtunkhwa (KP)	5%
Balochistan	16%
Sindh	25%

Note: the respondents include, but are not limited to, those accused in criminal cases.

In part, the report observed, the problem was the low levels of awareness amongst the poorer sections about their rights and legal procedures, and even the “general mind set” being opposed to the concept. It narrated an incident, revealed through the focused group discussion, wherein a relief organization providing free legal aid to women prisoners was “asked to exit” by lawyers protesting against a decline in their market for legal services.²⁰³

IV. Analysis: Understanding the disjuncture between law and practice

A. Police

Non-prosecution of some accused, and delay in the conclusion of trials, purportedly occur because the police often take bribes to delay or close investigations; are inadequately trained in the collection of evidence; or have multiple responsibilities such as maintenance of law and order and VIP security. Apart from being overworked, the police are also underpaid, have few career advancement prospects and face political interference in their

²⁰⁰ Press Correspondent, *Juvenile justice law exists only on paper*, THE DAWN, 4th February, 2012, <<http://www.dawn.com/news/693240/juvenile-justice-law-exists-only-on-paper>>

²⁰¹ INSAF, *Voices of the Unheard*, UNDP (2012), <<http://www.inp.org.pk/sites/default/files/job%20description/%20Executive%20National%20Research%20on%20Legal%20Empowerment%20in%20Pakistan%201.pdf>> at 77.

²⁰² The sampling universe of the study comprised of “all persons qualified to receive assistance under the Benazir Income Support Program” from 31 selected districts, where UNDP planned interventions in the next 3-5 years. 10,322 respondents were randomly selected from these BISP-eligible beneficiaries. Further information on the sampling methodology can be found in section 3.2 of the report. INSAF, *supra* note 201, at 15, 19, 20.

²⁰³ INSAF, *supra* note 201, at 77.

daily functioning.²⁰⁴ This can help explain the low conviction rates of 5-10%, reported by the International Crisis Group in its 2010 report on Pakistan.²⁰⁵ All this increases the time spent in pretrial detention.

(I) CORRUPTION

Police are often viewed as a source of terror, rather than a source of protection, especially for those without patronage or influence.²⁰⁶ As per a Transparency International household survey in 2002, the police was the most corrupt amongst public institution in Pakistan, with 100% of the 3000 respondents experiencing corruption while interacting with the police.²⁰⁷ Till today, (as per the 2012 Corruption Perception Index), the police remain the most corrupt institution.²⁰⁸

The US State Department in its annual country report on Pakistan notes that the police “routinely” do not seek magisterial approval for investigative detention and “often h[o]ld detainees without charge until a court challenge[s] the detention.”²⁰⁹ Citizens here simultaneously experience the problems of facing a high number of malicious prosecutions and bogus cases, whilst being unable to file an FIR thereafter.²¹⁰

(II) POOR RESOURCE ALLOCATION AND WORKING CONDITIONS

Police duties in Pakistan, like India, are split between investigation and maintenance of law and order (comprising VIP security, special operations, and use of preventive detention powers in cases of unlawful assemblies, processions, and elections involving a breach of peace).²¹¹ The Human Rights Commission of Pakistan (“HRCP”) notes that an “unjustifiably large number” of officers are consigned to security duties, reducing the man hours available for investigation.²¹² For instance, 4000 policemen of the well-trained “Elite Force” are currently being used for security cover for the ruling elite in Punjab. The Punjab

²⁰⁴ Hassan Abbas, *Stabilizing Pakistan through Police Reform*, Asia Society: Report by the Independent Commission on Pakistan Police Reform, July 2012, <http://asiasociety.org/files/pdf/as_pakistan_police_reform.pdf>, at 24-26; Manzil Pakistan, *A Study on Criminal Law and Prosecution System in Pakistan*, 2013, <<http://www.manzilpakistan.org/wp-content/uploads/2014/01/Law-and-Justice-Study-on-Criminal-Prosecution.pdf>>, at 17.

²⁰⁵ The International Crisis Group does not explain how it reached this particular figure, although it notes that even this statistic is misleading; in practice, many convictions are obtained through guilty pleas, especially in drug cases. The report states that the conviction rate for “more serious cases” such as murder and terrorism offences is lower than the national average. The lack of faith in the trial process leads to instances of torture, indefinite detention and extra judicial killings. See ICG, *supra* note 193, at 12.

²⁰⁶ INSAF, *supra* note 201.

²⁰⁷ Transparency International, *supra* note 87, at 33.

²⁰⁸ Press Correspondent, *Land services, police most corrupt in Pakistan: Transparency International*, THE TRIBUNE, 9th July, 2013, <<http://tribune.com.pk/story/574577/land-services-police-most-corrupt-in-pakistan-transparency-international/>>.

²⁰⁹ US State Department, *supra* note 193, at 16.

²¹⁰ Manzil, *supra* note 204, at 13, 17.

²¹¹ Chaudhry Hasan Nawaz, *The Criminal Justice System in Pakistan: Contemporary Problems in Securing Efficient Administration of Criminal Justice*, Federal Judicial Academy, <[http://www.fja.gov.pk/dgarticle.htm#criminal justice](http://www.fja.gov.pk/dgarticle.htm#criminal%20justice)>.

²¹² HRCP, *supra* note 187, at 44.

Home Department estimates that 75% of the Elite Force has been deployed to provide “fool proof” VIP security instead of performing its regular duties.²¹³

The lack of a specialized “crime solving” department impedes investigations, contributes to the delay in trials, and eventually to the large number of pretrial detainees. Investigative officers usually work on 30-40 cases at a time, which affects the quality of work on each case.²¹⁴ Unofficial practices involve police officer submitting incomplete *challans* or police reports²¹⁵ and judges relying almost exclusively on oral, rather than physical, evidence.²¹⁶

(III) BUDGETARY SHORTFALL

As per the Assistant Commissioner with the Pakistani Administrative Service, the budget allocated for police stations is very low and cannot sustain the functioning of the police office without bribes. They narrate a story of how the government, keen on establishing a “model police station”, asked top officials for an overall budget. Against the requested budget of Rs. 150,000 per month (approximately \$1518), the government allocated only Rs. 60,000 (approximately \$608). Similarly, at regular police stations, the budget per FIR has been fixed at Rs. 250, which is not even enough to cover stationary and other incidental expenses. Inadequate resources thus result in non-investigation, delayed or ineffective investigation or malicious investigation of cases; this disproportionately affects the poor, who often end up in prison. Consequently, in many cases, “logistical” issues such as lack of fuel prevent the pretrial detainees from going to court, thus delaying their trial.²¹⁷

B. The Prosecutors

Prosecutors are underpaid and overwhelmed,²¹⁸ and thus, often corrupt.²¹⁹ Till 2003, there were no independent prosecution departments in Pakistan; the police under the aegis of the Home Department conducted all prosecutions at the trial level. Between 2003 and 2009, the provinces (Sindh, Punjab, Balochistan, NWFP) enacted laws to set up separate prosecution services.²²⁰ Nonetheless, prosecutors are still appointed and transferred by the provincial government and hence remain under executive control.²²¹ In Pakistan, like India,

²¹³ Ashraf Javed, *Elite police becomes Punjab protocol force*, THE NATION, 18th April, 2014, <<http://www.nation.com.pk/national/18-Apr-2014/elite-police-becomes-punjab-protocol-force>>.

²¹⁴ Katherine Houreld, *Pakistan's top court struggles to deliver justice*, REUTERS, 24th September 2012, <<http://www.reuters.com/article/2012/09/24/us-pakistan-justice-courts-idUSBRE88N0ZS20120924>>.

²¹⁵ Hon'ble Mr. Justice (Retd.) Mr. Justice Shafiqur Rahman, *Criminal Trial- Recent Changes in Substantive & Procedural Law*, Federal Judicial Academy, <<http://www.fja.gov.pk/conduct.htm#trial>>.

²¹⁶ Reuters, *supra* note 214.

²¹⁷ HRCR, *supra* note 187, at 60.

²¹⁸ Reuters, *supra* note 214.

²¹⁹ Manzil, *supra* note 204, at 3, 18.

²²⁰ Currently therefore, there are no police prosecutors in Pakistan. Commonwealth Human Rights Initiative/Human Rights Commission of Pakistan, *Police Organizations in Pakistan*, 2010, <http://www.humanrightsinitiative.org/publications/police/police_organisations_in_pakistan.pdf>; GIZ, *Support to Punjab Prosecution Service (SPSS) Project*, 2013, <<http://www.giz.de/de/downloads/giz2013-en-spps-punjab-prosecution-service.pdf>>.

²²¹ Chaudhry Nawaz, *supra* note 211; UNAFEI, *supra* note 112.

prosecutors are not empowered to control or supervise police investigations, and thus it is often left to the police to determine the legal status of pretrial detainees.²²²

The success of the prosecution system depends to some extent on the good intentions of the government. For instance, Punjab has repeatedly witnessed its top post of Prosecutor General lying vacant, with the current vacancy lasting for more than five months. As the influential Pakistani newspaper *Dawn* reports, this has affected the work and allowed “requests by influential people to recruit those not found fit for the slot to pile up”.²²³ Although the Chief Minister, responsible for making the appointment, has been notified and the High Court has directed action, no steps have been taken to remedy the situation.²²⁴ Previously, the post had remained vacant for an entire year when Prosecutor Bukhari resigned, and this was only rectified after *suo motu* action by the then Chief Justice of Pakistan, Iftikhar Chaudhry.²²⁵

The Public Prosecution Department suffers additionally from inadequate human resources (although exact numbers are hard to find), capacity, physical infrastructure, training and training facilities. Its “widely undefined role”, vis-à-vis the Judiciary and the Police, leaves it open to “considerable external pressure”.²²⁶ These shortcomings impede the functioning of the Prosecution Departments, which often results in delayed investigation/trial, increasing the time spent in pretrial detention.

C. The Judiciary

(I) BACKLOG IN THE JUDICIAL SYSTEM

Delay in the trial process is the other factor contributing to a high number of pretrial detainees.²²⁷ The number of cases and backlog, capacity constraints of the judges and frequent adjournments contribute to the rising backlog of cases. Although Order XVII, Rule 3 of the Code of Civil Procedure, 1908 allows the closing of evidence in cases of extreme delay, it is rarely used; adjournments are granted for the flimsiest of reasons.²²⁸ The HRCP notes that overcrowding in prisons is caused by the “stubborn refusal to consider modes of punishment other than imprisonment.”²²⁹

²²² UNAFEI, *supra* note 112.

²²³ Intikhab Hanif, *Still no Prosecutor-General in Pakistan*, THE DAWN, 3rd January, 2014, <<http://www.dawn.com/news/1078096>>.

²²⁴ Press Correspondent, *Government told to appoint the Prosecutor General of Punjab by March 13*, THE DAILY TIMES, 28th February 2014, <<http://www.dailytimes.com.pk/punjab/28-Feb-2014/govt-told-to-appoint-prosecutor-general-of-punjab-by-march-13>>.

²²⁵ Hanif, *supra* note 223.

²²⁶ GIZ, *supra* note 220.

²²⁷ HRCP, *supra* note 187, at 22.

²²⁸ Yasser Latif Hamdani, *The Crisis of Legal Aid in Pakistan*, INSAF Network, <<http://www.inp.org.pk/article-legal-aid-crisis-pakistan>>.

²²⁹ HRCP, *supra* note 187, at 60.

As of 1st April, 2014, the Supreme Court has a pendency of 20,147 cases, up from a pendency of 18,841 in April, 2013.²³⁰ In 2009, at the time of the introduction of the NJP, the total pendency (including superior and subordinate courts) was more than 1.5 million.²³¹ In 2012, this increased to 1.6 million as per a US State Department Report.²³² The backlog is caused by a combination of factors such as few judges, many cases, weak physical infrastructure and lack of incentives (given that there is no organized form of performance management).²³³ *Suo motu* action by the Supreme Court contributes to the backlog in the apex Court.²³⁴ In 2012, the IMF reported that Pakistan has a judge to population ratio of 12 judges per 1 million of population, with a clearance rate of only 30%.²³⁵ This is below India's rate of 13-15.5 judges per million population. The National Judicial (Policymaking) Committee's formal request to increase the number of judicial officers and strengthen physical infrastructure has gone "largely unheeded".²³⁶

The Lahore High Court faces a similar backlog issue, with 180,000 cases currently pending.²³⁷ The Supreme Court in 2014 tried to resolve this problem by requiring *all* judges (High Court and Trial Court) adopt a shorter format in deciding bail petitions, while criticizing the High Court for requiring twelve pages to dismiss the petitioner's bail application. Bail orders now should only record reasons for granting or refusing bail and not the arguments of the counsel,²³⁸ even if this makes it more difficult to understand the case. Interestingly, the Sindh High Court in a judgment delivered a day later, held that the proviso requiring the court to reject the bail of "hardened, desperate or dangerous" criminals requires them to go through the contents of the First Information Report and the evidence thus far on record. Such a lengthy examination goes against the earlier idea of bail being an "interim" application²³⁹ and has caused much confusion.

(II) CORRUPTION

Corruption plagues the Judiciary as well, particularly the subordinate Judiciary.²⁴⁰ As the US State Department Report notes, Magistrates often extend investigative detention without justification or issue new FIRs to extend the original 14-day detention period.²⁴¹ The report refers to instances of judges denying bail on the payment of bribes, although it makes these assertions very generally and does not explain the pervasiveness of the practice. It cites

²³⁰ Supreme Court of Pakistan, *Annual Report 2013-14*, <<http://www.supremecourt.gov.pk/Links/sc-a-rpt-2013-14/index.html#p=14>>, at 3.

²³¹ Masood and Masood, *National Judicial Policy of Pakistan*, <<http://masoodandmasood.com/national-judicial-policy-of-pakistan/>>.

²³² US State Department, *supra* note 193, at 18.

²³³ FOSI, *supra* note 163.

²³⁴ HRCP, *supra* note 187, at 23, 36. The Supreme Court has come under criticism for the "lack of guidelines governing how the Court takes up and prioritizes cases taken up using its original jurisdiction".

²³⁵ Clearance rate is defined as the number of cases resolved divided by the number of cases filed. IMF, *supra* note 120, at para 12.8.3.2.

²³⁶ HRCP, *supra* note 187, at 3, 23. Only the Punjab government responded to the Lahore High Court's demand for appointing 317 additional district judges and 696 civil judges. The State sanctioned Rs. 1 billion for this purpose.

²³⁷ *Md. Shakeel v State*, Crim. Petition No. 203-L of 2014, decided on 20.03.2014.

²³⁸ *Md. Shakeel v State*, Crim. Petition No. 203-L of 2014, decided on 20.03.2014.

²³⁹ *Khalid v State*, 2014 PCrLJ 437 (Sindh High Court).

²⁴⁰ Manzil, *supra* note 204, at 9.

²⁴¹ US State Department, *supra* note 193, at 16.

NGO reports to show that bail is often denied in blasphemy cases due to political reasons or the pretext that the accused is likely to flee, given the possibility of capital punishment.²⁴² This is most evident in the now famous Asia Bibi case, where a Christian woman was denied bail, and subsequently sentenced to death under blasphemy laws.

However, as per the Pakistani Administrative Service official, corruption is not as pervasive in cases of bail as other matters (or compared to the police). This is borne out of Transparency International's 2002 survey that did not list the Judiciary as part of the three most corrupt public institutions in Pakistan; those were the police, land administration and tax departments.²⁴³

(III) SECURITY CONCERNS

In 2009 the IBA Human Rights Institute Report (IBAHARI), supported by FOSI examined the independence of the Judiciary in Pakistan in detail. Their findings reveal that, especially in cases of violent crime and blasphemy cases, judges are under pressure to convict.²⁴⁴ This might extend to pressure to deny bail, as a punitive response to the alleged crime committed.

D. Inability to pay the bail bonds

Much like India, the Judiciary in Pakistan does not discuss the economic circumstances of the accused or the feasibility to pay the required bail amount. In fact, s. 498 of the CrPC only requires a consideration of the “circumstances of the case” and not the circumstances of the accused. However, unlike India (s. 436 of the Indian CrPC), no direct provision mandates the court to release the accused on a personal bond without surety if they are indigent and arrested for the commission of a bailable offence.

The type of offence (bailable or non-bailable) does not seem to determine or affect the amount of bail bond required. For instance, the Karachi High Court in *Sikandar v State*²⁴⁵ set a bail bond for a bailable offence of Rs. 200,000 (equivalent to approximately \$2022), while the Supreme Court in *Shabeer v State*²⁴⁶ set a similar amount for a non-bailable offence. Similarly, in another case the Supreme Court granted bail of Rs. 200,000 with two sureties with a personal recognizance bond of the same amount.²⁴⁷

In most cases, the circumstances of the accused are not explained and so it is hard to determine whether the bail amount of Rs. 200,000 or Rs. 50,000 (\$506) (in *Abdul Sattar v State*)²⁴⁸ or Rs. 20,000,000 with two sureties (\$202,429) (in *Tariq Saeed v Chairman, National*

²⁴² Id.

²⁴³ Transparency International, *supra* note 87.

²⁴⁴ International Bar Association of Human Rights Institute, *A Long March to Justice: A Report on the Judicial Independence and Integrity in Pakistan*, 2009, <
http://www.ibanet.org/Human_Rights_Institute/HRI_Publications/HRI_Publications.aspx>, at 52

²⁴⁵ 2007 PCrLJ 917 (Karachi High Court).

²⁴⁶ Criminal PLA No. 84K of 2011, decided on 28.09.2011 by the Supreme Court of Pakistan.

²⁴⁷ *Abid Ali alias Ali v State*, 2011 SCMR 161 (Supreme Court of Pakistan).

²⁴⁸ 2006 YLR 1385 (Karachi High Court).

Accountability Bureau)²⁴⁹ is excessive or affordable. For instance, in *Sufyan v State*,²⁵⁰ the petitioner was a 16 year old juvenile accused of murder and was granted bail subject to him furnishing bail bonds to the tune of Rs. 200,000 with two sureties in the like amount to the satisfaction of the trial court. Such cases thus demonstrate that the right to bail might be reduced to a paper right if the courts fail to consider the ability of the accused to pay the bail bond.

E. Inability to effectively utilize the legal aid provisions

Not only are pretrial detainees often too poor to pay the bail amounts, they are often unable to access the legal aid provisions. This could be due to a combination of reasons ranging from ignorance about the provisions of the Act, corruption within the Legal Aid Boards or apathy amongst the lawyers.

Although the Pakistan Bar Council Free Legal Aid Rules, 1999 provide free legal aid on application to the District Committee, they only “request” advocates to take up *one* case per year free of charge.²⁵¹ Moreover, the fees paid to the advocates for this case is minimal; for instance, for trial court matters involving bail, lawyers will be paid a maximum of Rs. 2000 (approximately \$20).²⁵² Thus, there is little incentive to take up a case, and even when they do, to represent the accused diligently.²⁵³ Consequently, similar to Bangladesh, the burden of providing legal aid falls on NGOs. For instance, SPARC (Society for the Protection of the Rights of the Child), a child rights NGO provided legal aid to 499 juveniles in 2010.²⁵⁴

V. Solutions and Recommendations

A. The National Judicial Policy

As explained earlier, the NJP was drafted in 2009 and revised in 2012 to improve the administration of justice. Its focus on reducing judicial corruption and delays has paid some dividend, in part due to the establishment of “NJP Implementation Cells” in various High Courts.²⁵⁵

(I) CORRUPTION

Pretrial detention is largely caused by corruption in the police and delays in the legal system. Although corruption still remains a problem amongst the trial courts, it is not as pervasive as in the police, in cases involving pretrial detention because of three primary reasons. *First*, the NJP’s provisions on eradication of corruption in the lower courts have been partially implemented. These involve establishing anti-corruption Cells in each High

²⁴⁹ 2005 YLR 445 (Lahore High Court).

²⁵⁰ 2014 YLR 422 (Lahore High Court).

²⁵¹ Rule 8(e), Legal Aid Rules, 1999.

²⁵² Schedule to the Rules of the Legal Aid Act, <<http://pakistanbarcouncil.org/wp-content/uploads/2012/07/1999.pdf>>.

²⁵³ INSAF, *supra* note 201, at 2.

²⁵⁴ Dawn, *supra* note 200.

²⁵⁵ *NJP Implementation Cell*, Lahore High Court, <http://lhc.gov.pk/?page_id=3033>.

Court,²⁵⁶ declaration of assets, surprise inspections and, monitoring and supervision by Member Inspection Teams. Any subordinate judge may be asked to send a copy of their bail order for further scrutiny.

Secondly, judges' promotions are now monitored; they are put under a probationary period before their confirmation and their judgments are evaluated before promoting them further. High Courts have been asked to "give incentives in terms of advanced increment or cash awards" to high performing judges. Conversely, police officers do not face similar scrutiny or performance incentives while assessing their promotion options. Promotion of judicial magistrates is based on assessing the reversal rate of their decisions by the High Court, while no one considers the conviction rates of police officers.

Finally, basic salaries of subordinate judges have increased rapidly, with Punjab leading the way since 2008 – Sessions Judges now earn Rs. 120,000 per month (approximately \$1215), instead of Rs. 28,000 (approximately \$2300), while Civil Judges cum Judicial Magistrates have seen a salary spike from Rs. 8000 (approximately \$81) to Rs. 32,000 (approximately \$324).²⁵⁷ Increased salaries are accompanied with expectations of improved performance, which has worked because of the supervision by the High Courts. Salary increase in the police force has not yielded similar results because of the structural factors discussed above.

(II) BACKLOG

To reduce delays, the NJP gives Magistrates three days, Sessions' judges five days, and High Courts seven days to decide bail application. Applications for cancellation of bail are required to be disposed of within 15 days. It further provides for a six-month, fast track completion of criminal cases with punishment less than seven years. For more serious cases, trial must be completed within one year. Similar stipulations exist for civil cases. The NJP also provides for action to be taken against judges for "unusual delays or inefficient performance." Since 2009, this has resulted in a cumulative disposal figure that is 289,505 higher than the cumulative institution of cases.²⁵⁸ In practice, as per the Pakistani Administrative Service official, High Courts have started requiring monthly progress reports from lower courts indicating their institution and disposal rates and have taken disciplinary action against judges for corruption.²⁵⁹

²⁵⁶ *Meetings of the National Judicial (Policy Making) Committee*, Supreme Court of Pakistan, 23rd November, 2013, <<http://www.supremecourt.gov.pk/web/page.asp?id=1696>>; *Meetings of the National Judicial (Policy Making) Committee*, Supreme Court of Pakistan, 10th December, 2013, <<http://www.supremecourt.gov.pk/web/page.asp?id=1715>>.

²⁵⁷ Amir Riaz, *Three Fold Increase in Judges Salaries*, THE NATION, 17th JUNE, 2008, <<http://www.nation.com.pk/politics/17-Jun-2008/Threefold-increase-in-judges-salaries>>.

²⁵⁸ As per the Executive Summary of the Revised Edition (2012) of the NJP, since 2009, the Supreme Court, Federal Shariat Court, High Courts and District Judiciary decided 8,532,548 cases against an institution of 8,234,043 cases.

²⁵⁹ The Lahore High Court initiated disciplinary action against seven judges on charges of corruption and misconduct; a senior civil judge was dismissed. Senior Correspondent, *Senior civil judge dismissed, notices issued to two others*, THE NEWS, 11th December, 2011, <<http://www.thenews.com.pk/Todays-News-5-81711-Senior-civil-judge-dismissed-notices-issued-to-two-others>>.

Although successful, there is still a long way to go before implementing other provisions of the NJP – such as designating a Judicial Magistrate in every district to visit prisons to remand those prisoners who could not be brought before the court; ensuring every accused in need has a legal aid lawyer; and the completion of trial within six months/one year.

B. Support to Punjab Prosecution Service

The German Foreign Office, through GIZ, started the Support to Punjab Prosecution Service (“SPSS”) Project from September, 2011 to June, 2014, with an anticipated extension. It has focused on various activities including building capacity, extensive training, infrastructure development and collaboration.

GIZ assessed training needs in 2012 and identified three different, permanent types of training:

- induction training for the newly appointed and relatively junior prosecutors;
- expert training for the senior prosecutors; and
- “Training of Trainers” Program for those senior prosecutors who are selected to become “Master Trainers”, and will eventually become in-house faculty by 2014.

Training was imparted with the help of modules developed specifically by experts, academics and lawyers. The modules covered topics of criminal procedure, evidence, advocacy skills, ethics, forensic accounting and medicine. SPSS also helped establish the first fully furnished and equipped training centre, the Centre for Professional Development.

Infrastructure development was done through the physical refurbishment of prosecutors’ offices and providing access to online resources and libraries. GIZ worked with the Public Prosecution Department to set up a “model prosecution office” to improve mechanisms of data collection and evaluation, case management, monitoring and evaluation.

Emphasis was placed on increasing the collaboration between the police and prosecutors, and between judges and prosecutors for pre-trial and in-trial work.²⁶⁰ Joint training to improve police and prosecutor cooperation is also being conducted by the US government funded DOJ Resident Legal Advisor Programme.²⁶¹

²⁶⁰ GIZ, *supra* note 220.

²⁶¹ US State Department, *Pakistan Rule of Law: Fact Sheet*, 23rd November, 2011, <<http://www.state.gov/j/inl/rls/fs/177705.htm>>.

Country Report for Bangladesh

I. Country Background

Table 21: Population, economy, administration and criminal justice system figures for Bangladesh

Population figures	Numbers
Present population (2013)	156.6 million
Expected population (2050)	201.948 million
Proportion of population under the age of 15 years	31%
Urbanization rate (urban population as a % of total) (2013)(WB) ²⁶²	29%
Economy	
GDP (current US\$)(2013) (WB)	129.9 billion
GNI per capita, Atlas method (current US\$)(2013) (WB)	900
GDP per capita (US\$ at PPP) (CIA)	2100
Gini index (2010) (WB)	32.1
Administration	
Form of government	Parliamentary democracy
Number of states/provinces	7 administrative divisions (Barisal, Chittagong, Dhaka, Khulna, Rajshahi, Rangpur and Sylhet)
Judicial system	The Supreme Court is the apex court and is subdivided into an appellate and High Court division. The subordinate criminal courts are divided into Magistrates Courts (for offences punishable with seven years) followed by Courts of Sessions (for more serious offences, punishable by 10 years or more)
Criminal Justice System	
Criminal justice tradition	Mixed legal system of mostly common law and Islamic law
Number of all crimes recorded (2013) (Bangladesh Police)	179,199
Number of police officers (2013)	139,546
Number of police officers per 100,000 population	89.1
Number of judges per million population (2012)	12 (assuming all sanctioned spaces are filled)
Judge to case ratio (2010)*	1:868

²⁶² The World Bank calculates this as people living in urban areas, as defined by national statistical offices. It is calculated using World Bank population estimates and urban ratios from the United Nations World Urbanization Prospects.

* Judge to case ratio, although not expressly defined by the Asian Legal Resource Centre, is presumably the number of cases, on average, a judge hears annually.

Sources: Asian Legal Resource Centre;²⁶³ the Bangladesh Police;²⁶⁴ the CIA World Fact book;²⁶⁵ the Daily Pioneer;²⁶⁶ the Kaiser Family Foundation,²⁶⁷ NIPSA;²⁶⁸ the UNODC;²⁶⁹ the UN Population Division;²⁷⁰ and the World Bank²⁷¹

For research on Bangladesh, I talked an individual with previous experience as a practicing advocate and currently working in an NGO. Their views might not be representative of the existing system and should be treated accordingly.

II. Historical trends

Table 22: Changing prisoner and pretrial detainee numbers in Bangladesh, 2003-2014

Year	Number of prisoners	Number of pretrial detainees	PTD/imp (% of prison population)	Pre-trial/remand population rate/100,000
1993	41,618	No data		
1996	43,100	No data		
2003	67,321	45,173	67.1%	32
2006	72,062	48,354	67.1%	33
2010	69,092	50,576	73.2%	33
2014	65,652	45,300	69%	29

Source: ICPS, World Prison Brief. Despite various efforts, no official government statistics could be found.

²⁶³ Md. Shariful Islam, *Politics Corruption Nexus in Bangladesh: An Empirical Study on the Impacts on Judicial Governance*, Asian Legal Resources Centre, 2010, <<http://www.ahrchk.net/pub/pdf/ALRC-PUB-001-2010-BN-Politics-Corruption.pdf>>.

²⁶⁴ Bangladeshi Police, *Crime Statistics Yearly: 2013*, <<http://www.police.gov.bd/Crime-Statistics-yearly.php?id=317>>.

²⁶⁵ CIA World Factbook, *Bangladesh*, <<https://www.cia.gov/library/publications/the-world-factbook/geos/bg.html>>.

²⁶⁶ Joginder Singh, *Justice is crumbling but no one bothers*, THE DAILY PIONEER, 17th March, 2013, <<http://www.dailypioneer.com/columnists/edit/justice-is-crumbling-but-no-one-bothers.html>>.

²⁶⁷ The Henry J. Kaiser Family Foundation, *Population under Age 15 (Percent)*, <<http://kff.org/global-indicator/population-under-age-15/>>.

²⁶⁸ "Facts and Figures" in Network for Improved Policing in South Asia, *Bangladesh*, <<http://www.nipsa.in/bangladesh>>.

²⁶⁹ UNODC, *supra* note 18.

²⁷⁰ UN Population Division, *World Population Prospects: The 2012 Revision* <http://esa.un.org/wpp/unpp/panel_population.htm>.

²⁷¹ World Bank, *Bangladesh*, <<http://data.worldbank.org/country/bangladesh>>.

III. Existing laws and practice

A. Laws and jurisprudence

(I) INVESTIGATORY PROVISIONS

Section 61 of the Bangladeshi CrPC states that the maximum time period between arrest and first appearance before a judge is 24 hours, unless so authorized by a special order of the Magistrate under s. 167.²⁷²

Section 167 deals with cases where the investigation cannot be completed within 24 hours and the arrested person has to be produced before a Magistrate. Under s. 167(2), Magistrates can authorize the further detention of the accused for 15 days. Sub-section 5 was introduced via the 1992 amendment and states that the Magistrate or the Court of Sessions “may” release the accused on bail, subject to their satisfaction, if the police investigation remains unfinished within 120 days from the “*date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation*”.²⁷³ Thus, it seems that pretrial detention will be subject to review after 120 days from this date, although there is no guarantee of the accused being released on bail on receipt of information or the Magistrate’s order. However, the Magistrate has the discretion (“may”) to release the accused on bail. Unlike Pakistan, no special provisions are made for interrogating women accused.

Section 173 of the CrPC requires that every investigation be completed “without unnecessary delay” and a police report be filed. Unlike India and Pakistan, there does not seem to be a requirement of submitting the investigation report within 14 days, although the Bengal police regulations state that “*it should rarely be necessary to prolong the investigation of even the most difficult case beyond 15 days.*”²⁷⁴

²⁷² **Person arrested not to be detained more than twenty-four hours-** Person arrested not to be detained more than twenty-four hours.- No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate’s Court.

²⁷³ Section 167(5) on the **Procedure when investigation cannot be completed in twenty-four hours** states that: If the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the Magistrate for such investigation-

- (a) the Magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Magistrate; and
- (b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such Court:

Provided that if an accused is not released on bail under this sub-section, the Magistrate or, as the case may be, the Court of Session shall record the reasons for it:

Provided further that in cases in which sanction of appropriate authority is required to be obtained under the provisions of the relevant law for prosecution of the accused, the time taken for obtaining such sanction shall be excluded from the period specified in this sub-section.

²⁷⁴ **Regulation 261** states that Circle Inspectors shall see that investigating officer complete their investigations as required by section 173, Code of Criminal Procedure, and that the provisions of clause (b)

(II) BAILABLE AND NON-BAILABLE OFFENCES

- **Bailable offences**

Similar to India and Pakistan, Bangladesh classifies offences as bailable and non-bailable. Bailable offences, under s. 496 of the CrPC, are those where the judge or officer in charge of a police station must grant bail. Here, the accused is released on the provision of money bail; or at the court/officer's discretion, on the execution of a bond for personal appearance without sureties.²⁷⁵

Some examples of bailable offences include being a member of an unlawful assembly; rioting; taking a gratification by corrupt or illegal means to influence a public servant; contempt of the lawful authority of public servants; and most offences relating to elections (except illegal payments in connection with elections). For a list of offences, which are bailable/non bailable and cognizable/non-cognizable, see <http://bdlaws.minlaw.gov.bd/pdf/75_Schedule.pdf>.

- **Non-bailable offences**

Section 497 of the CrPC deals with the grant of bail in non-bailable offences and enjoins that a person be denied bail if there appears "reasonable grounds for believing" that they are guilty of an offence punishable with death or life imprisonment; however, this does not require an examination of the merits of the case.²⁷⁶ Moreover, the Court has the discretion to release a woman, a child under the age of 16 years, any sick or infirm person accused of such offences on bail. If there are "sufficient grounds for further inquiry" and no reasonable grounds exist, any accused "shall" be released on bail subject to the execution of a bail bond or a bond without sureties.²⁷⁷

are not abused. If the directions in clause (a) are strictly observed, it should rarely be necessary to prolong the investigation of even the most difficult case beyond 15 days.
<http://www.police.gov.bd/userfiles/Police%20Regulations1.pdf>

²⁷⁵ **496. In what cases bail to be taken:** When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

²⁷⁶ *Mohammad Aslam v State*, 19 DLR (SC) 445.

²⁷⁷ **When bail may be taken in case of a non-bailable offence** 497.(1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

The granting of bail is the rule, not an exception; even in cases of offences punishable with life imprisonment or death, courts retain the discretion to release the accused on bail. The appellate division of the Supreme Court has held that s. 498 provides virtually unlimited powers to release an accused on bail, subject to “reasonable grounds for believing” the accused’s guilt and considerations around the possibility of tampering with evidence.²⁷⁸

Pursuant to a 1982 amendment, s. 339C of the CrPC was introduced stipulating that an accused “may” be released on bail, subject to the Court’s satisfaction, if the trial cannot be concluded within 180 days in a Magistrate’s Court or 360 days in a Court of Sessions.²⁷⁹ This has been interpreted by the appellate division of the Supreme Court in *Captain (Rtd) Nurul Huda v State*,²⁸⁰ as being an effectively mandatory provision holding that, “for failure to complete the trial within the specified time a right is accrued to the accused of a non-bailable offence which has the mandatory effect to be released.” The Court held that the section provides courts with discretion “to be exercised in exceptional circumstances” to deny bail for “very cogent reasons”, including the strong possibility of the accused absconding, tampering with witnesses, or hindering the prosecution of the trial. The Supreme Court nullified the High Court division’s ruling that a speedy trial is not a hard and fast rule in all circumstances’ and that delays do not constitute good grounds for granting bail, especially if the person is accused of an offence punishable with life imprisonment or death. On the facts of the case (the accused had been in custody for nearly six years without any trial and was sick – suffering from prostrate problems, mental illness and depression), the Court granted bail due to the “undue delay in holding trial ... and due to the prosecution's procrastination”. The Court held more generally,

thus apart from the provision in section 339C(4) of the Code of Criminal Procedure, inordinate delay in prosecution of the instant case thereby dragging of the proceeding in a trial, for no fault of the accused may be considered to be a ground for enlarging the accused appellant on bail.

In an earlier case in *Nurul Amin alias Bada v State*,²⁸¹ the Supreme Court had held that “long delay in holding trial provides a good ground for bail.” Here the accused had been held in custody for four years without charges being framed against him, although a charge sheet had been filed 2.5 years ago. Since the delay was not on account of his actions and his co-accused had been released on bail, bail was granted.

²⁷⁸ *Captain (Rtd) Nurul Huda v State*, 55 DLR(AD) (2003) 33 (Appellate division of the Supreme Court).

²⁷⁹ Section 339C is on the **Time for disposal of such cases:** (1) A Magistrate shall conclude the trial of a case within 331[one hundred and eighty days] from the date on which the case is 332[received by him] for trial.

(2) A Sessions Judge, an Additional Sessions Judge or an Assistant Sessions Judge shall conclude the trial of a case within 333[three hundred and sixty days] from the date on which the case is received by him for trial.

(4) If a trial cannot be concluded within the specified time, the accused in the case, if he is accused of a non-bailable offence, may be released on bail to the satisfaction of the Court, unless for reasons to be recorded in writing, the Court otherwise directs.

²⁸⁰ 55 DLR(AD) (2003) 33 (Appellate division of the Supreme Court).

²⁸¹ (1996) 16 BLD 200.

The High Court division of the Bangladeshi Supreme Court has been applying similar principles while granting bail to accused when the delay has been nearly three months,²⁸² more than a year,²⁸³ or three years²⁸⁴ due to no fault of theirs. The grounds for bail involve the petitioner having a “fair chance at acquittal”, the trial being delayed for no fault of theirs, and no certainty when the trial will be commenced. However, in all these cases, the accused have been required to furnish a bail bond to the satisfaction of the Magistrate.

- **Bail amounts**

Section 498 of the CrPC states that the amount of bail bond will be fixed with “due regard to the circumstances of the case” and shall “not be excessive”. Furthermore, the High Court and the Court of Sessions can “at any time” reduce the amount of bail.

(III) ALTERNATIVES TO PRETRIAL DETENTION

The CrPC does not recognize alternatives to pretrial detention, apart from bail and personal recognizance.

(IV) ANTICIPATORY BAIL

Similar to Pakistan, Bangladesh does not expressly provide for anticipatory bail in the CrPC; however, it has been introduced through judicial directives interpreting s. 498.²⁸⁵ The appellate division of the Supreme Court has held that anticipatory bail is considered an “extraordinary relief” to be exercised only in exceptional circumstances,²⁸⁶ when the purpose of the alleged proceedings is to “*achieve a collateral purpose by abusing the process of law, such as, harassment, humiliation etc.*”²⁸⁷ A person charged with a serious offence is not usually entitled to be released on anticipatory bail, unless the circumstances so direct.

Furthermore, anticipatory or “pre-arrest bail” is to be granted by the Court of Sessions or the High Court, based on the circumstances, for a limited time period or till the police report is filed. The appellate division of the Supreme Court has been hesitant to order anticipatory bail when the FIR contains “specific allegations of overt acts” or when the “admitted fugitives are sure to be arrested.”²⁸⁸ This is because the conditions for the grant of anticipatory bail include the following:

- the allegation is vague;

²⁸² Md. Khorshed Alam v State, 64 (DLR) 2012 234.

²⁸³ Karim Ullah alias Kalim Ullah v State, 64 (DLR) 2012 22; Md. Babul Mia v State, LEX/BDHC/0099/2011, Crim. Appeal No. 4323 of 2010, decided on 15.03.2011.

²⁸⁴ Md. Jashim Uddin v State, 64 (DLR) 2012 161; Md. A. Razzak alias Razzak alias Shourav alias Shariful v State, LEX/BDHC/0348/2011, Crim. Misc. Case No. 415 of 2011, decided on 20.03.2011.

²⁸⁵ The appellate division of the Supreme Court in a landmark case in *State v Abdul Wabab Shah Chowdhury*, (1999)19 BLD 189, referred to the express legislative provision *vide* s. 438 of the Indian CrPC incorporating the concept of anticipatory bail. It recommended that the Bangladesh Law Commission take similar steps to provide a statutory basis for anticipatory bail.

²⁸⁶ *State v Zakaria Pintu*, 62 DLR (AD) (2010) 420 (Appellate division of the Supreme Court).

²⁸⁷ *State v Abdul Wabab Shah Chowdhury*, (1999)19 BLD 189 (Appellate division of the Supreme Court).

²⁸⁸ *State v Zakaria Pintu*, 62 DLR (AD) (2010) 420 (Appellate division of the Supreme Court); *State v Abdul Wabab Shah Chowdhury*, (1999)19 BLD 189 (Appellate division of the Supreme Court).

- there is no material is on record to substantiate the allegation;
- there is no reasonable apprehension that the witnesses may be tampered with;
- the apprehension of the applicant that they will be unnecessarily harassed, appears to be justified before the Court, on the materials on record;
- it must satisfy the criteria for granting bail under section 497 of the Code;
- the allegations are made for collateral purpose but not for securing justice for the victim; and
- there is a compelling circumstance for granting such bail.²⁸⁹

(V) LEGAL AID PROVISIONS

The government enacted the Legal Aid Services Act, 2000, pursuant to which (s. 7(a)) it formulated the Legal Aid Policies of 2001. The policies list the persons who “shall be considered to be eligible for receiving legal aid” and covers:

- a person unable to protect his/her right in court or to defend him/herself for financial insolvency;
- a person detained without trial and unable to take proper steps in self-defense due to financially insolvency;
- a person considered by the court as financially helpless and insolvent; and
- the person recommended or considered by the Jail Authority as financially helpless and insolvent;
- persons who are unable to conduct a case to protect his/her right.²⁹⁰

Legal aid has been defined broadly under s. 2 of the Act as including counselling, lawyers’ fees and other incidental costs for litigation expenses. The Policies define a person who is “insolvent or financially insolvent” as someone whose annual average income is not above Taka 50,000 (approximately \$650). The phrase “who shall be considered to be eligible” seems to suggest that, unlike India, not everyone in custody is covered under the legal aid provisions. As Child Right International Network specify, as per Article 33 of the Constitution²⁹¹ and s. 341 of the CrPC,²⁹² any person arrested and detained in custody has the right to consult and be defended by a lawyer of their choosing, but this right does not extend to the right of free legal assistance. The Legal Aid Act itself is silent on when the provisions of the Act come into play, whether at the point of arrest, interrogation (where statements made to the police are not admissible)²⁹³ or production before a judge.

²⁸⁹ The State, represented by the Deputy Commissioner, Bholā v Md. Monirul Islam alias Nirab, 8 ADC (2011) 620 (Appellate division of the Supreme Court).

²⁹⁰ *Legal Aid Policies 2001*, Bangladesh, <<http://www.nlaso.gov.bd/Form-NLASO/Policy%202001.pdf>>.

²⁹¹ **Article 33(1)** states that “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.”

²⁹² **Section 341** states that, “If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than High Court Division, if such [proceedings result] in a conviction, the proceedings shall be forwarded to the High Court Division with a report of the circumstances of the case, and the High Court Division shall pass thereon such order as it thinks fit.”

²⁹³ Section 162, CrPC.

Applications for receiving legal aid need to be filed before the National or the District Board on Legal Aid (as appropriate) per s. 16 of the Legal Aid Services Act. If the District Committee rejects the legal aid application, the applicant has 60 days to prefer an appeal before the National Board.

Another important provision is s. 546A of the CrPC, which states that the court may order the convict to reimburse the complainant for the filing of the petition and serving notices or processes on witnesses and the accused. The court has further discretion to sentence the accused to 30 days simple imprisonment if they are unable to make the payment.²⁹⁴

B. Practice

(I) BAILABLE AND NON-BAILABLE OFFENCES

Like India and Pakistan, the high proportion of pretrial detainees is a partial consequence of the non-implementation of the law and judicial directives. In a 2004 case, *Bangladesh Legal Aid and Services Trust v Bangladesh*,²⁹⁵ the Supreme Court of Bangladesh (High Court Division) was faced with a situation wherein 155 pretrial detainees had been held in Dhaka Central Jail for more than 365 days due to the prosecution's failure to produce witnesses. Many of these prisoners had been in prison for more than five years, with the Court highlighting the plight of one Mr. Md. Jahangir who was in custody for 11 years, having been produced before the judge on 78 occasions. The time-wise breakdowns of a further 7409 prisoners (accepted by the government) are reproduced below:

Number of years in custody	Number of under trial prisoners
More than 11 years	16
More than 10 years	10
More than 9 years	29
More than 8 years	51
More than 7 years	111
More than 6 years	238
More than 5 years	502
More than 4 years	917
More than 3 years	1592
More than 2 years	3673
More than 1 year	270
More than 1 year (women and children)	104 women and 51 children

²⁹⁴ **Section 546A** states that 546A.(1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may in addition to the penalty imposed upon him, order him to pay to the complainant:

(a) the fee (if any) paid on the petition of complaint or for the examination of the complainant, and

(b) any fees paid by the complainant for serving processes on his witnesses or on the accused, and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

(2) An order under this section may also be made by an Appellate Court, or by the High Court Division, when exercising its powers of revision.]

²⁹⁵ 57 DLR (HCD) (2005) 11, WP No 7578 of 2003, decided on 3rd August 2004 (<http://www.blast.org.bd/content/judgement/57DLR-HCD-2005.pdf>).

Of these 7000 plus pretrial detainees, “118 women and 214 are children below 18 years” The Supreme Court had previously passed an order in 2003 directing the immediate trial (with legal aid) for juvenile prisoners; however, it noted that the previous order had not been “meaningfully implemented”. Nevertheless, the Court reiterated its previous direction requiring government compliance.

Similarly, the High Court division of the Supreme Court has in many instances directed the Trial Court to conclude the trial within a specified time (e.g. two months,²⁹⁶ four months²⁹⁷ or six months)²⁹⁸ or else to “consider the bail of the petitioner”. None of these rulings definitely provide for the release on bail.

(II) LEGAL AID PROVISIONS

The implementation of the Legal Aid Act and Policies leaves much to be desired. That not everyone is receiving legal aid in practice is evident from the fact that not all of the Legal Aid Fund is actually disbursed (and it was as low as 25% in 2008-09).²⁹⁹ In fact, a 2010 study by *Manusher Jonno Foundation* found that free legal aid services for the poor and vulnerable “remains largely unused and ineffective, as the general people are not aware of such service.” 16 of the 64 districts “failed to utilize even a portion of their funds.”³⁰⁰

Applications for legal aid (under s. 16) require the person to apply directly to the Chief Judicial Officer of the District or; to the Chairman of the Organization, if it is made for any matter in the Supreme Court.³⁰¹ The application process may thus prove difficult for the truly needy applicants to execute. Furthermore, applications are only considered at the meetings of the Committees; the National Board meets once every three months and the District Committees meet monthly. These boards comprise of judges and members of the administration and constitute another source of delay in the trial of the accused. Moreover, there are no set criteria for determining which cases are entitled to legal aid.³⁰²

Although this is improving with the new government, as Ian Morrison, the Director of the Bangladesh Legal Aid Reform Project points out, the issue in Bangladesh is complicated by the presence of many NGOs who provide legal aid, although such assistance cannot be claimed from them as a matter of right.³⁰³ This reduces the urgency and burden on the government. In fact, the government funded legal aid system is running only with the help of the Canadian International Development Agency.

²⁹⁶ *Md. Nashir v State*, LEX/BDHC/0349/2011, Crim. Misc. Case No. 737 of 2011, decided on 28.03.2011.

²⁹⁷ *Abammad Hossen alias Gura Miab v State*, LEX/BDHC/0111/2011, Crim. Appeal No. 4856 of 2010, decided on 01.03.2011.

²⁹⁸ *Md. Shahidul Islam v State*, 64 (DLR) 2012 116; *Zabbar Muhury v State*, 64 (DLR) 2012 145.

²⁹⁹ Ian Morrison, *Legal Aid in Bangladesh*, International Legal Aid Group Newsletter, Issue #13, March & June, 2010, <<http://ilagnet.org/index.php/en/2013-09-24-22-38-13/archive.html>>; Ian Morrison, *Legal Aid, Development and Bangladesh: Signs of Progress*, International Legal Aid Group Newsletter, Issue #21, September & October 2011, <<http://ilagnet.org/images/newsletters/21.pdf>>.

³⁰⁰ Press Correspondent, *District legal aid funds unutilised says MJF study*, THE DAILY STAR, 24th June, 2010, <<http://archive.thedailystar.net/newDesign/news-details.php?nid=143964>>.

³⁰¹ Rule 3, Legal Aid Services Rule, 2001.

³⁰² M.S. Siddiqui, *Legal Aid Act and Justice Delivery System*, 18(121) THE FINANCIAL EXPRESS, 9th August, 2010.

³⁰³ *Ibid*.

IV. Analysis: Understanding the disjuncture between law and practice

A. Police

(I) CORRUPTION

As per a Transparency International household survey in 2002, the police is the most corrupt public institution in Bangladesh with 84% of the 3030 respondents reporting experiences of corruption while interacting with the police.³⁰⁴

(II) MISUSE OF THE POWER OF ARRESTS

Ignorance of the law along with corruption seems to contribute to the vast number of arrests. This is best reflected in the observations of the High Court division of the Supreme Court in its 2010 decision in *State v Secretary, Ministry of Home Affairs* where it lamented the police's ignorance about s. 82 of the Penal Code (expressly holding that "nothing is an offence, which is done by a child under nine years of age"); s. 13(2) of the Children's Act (requiring the police to inform the parents or guardians of any child who has been arrested and brought to the police station); and s. 48 of the Children's Act (empowering police offices to release children on bail, even in case of serious or non-bailable offences). All these laws were breached in this case where three children (two boys aged 14 and 9 and one girl, aged 7 years) were arrested and kept in police custody overnight and produced before the Magistrate only after 24 hours had passed. The Court noted that even the Magistrate was unaware of the provisions of the Penal Code exempting children from prosecution and investigation; and that it was surprising that a bail application for the children was moved only two days after their arrest. In fact, the seven-year-old girl was kept in the female ward of the District Jail for three days before she was released on bail. Although this is just one case, it might illustrate the proclivity of the police to arrest first, and then investigate any accusation.

B. The Prosecutors

The Asia Human Rights Commission ("AHRC") and Asian Legal Resources Centre ("ALRC") report a trend of appointing ruling party affiliated lawyers as prosecutors in Bangladesh. Critiquing this practice of "disposable prosecutors", they describe the current government's move to replace the entire group of prosecutors on coming to power, and making politically motivated appointments to the Attorney General's office.³⁰⁵ Beyond this,

³⁰⁴ Transparency International, *supra* note 87, at 33.

³⁰⁵ Asia Human Rights Commission, *Bangladesh: End the politically chosen 'disposable' attorney and prosecutorial system*, Statement by AHRC, 14th January, 2009, <<http://www.humanrights.asia/news/ahrc-news/AHRC-STM-016-2009;U4>>, Transparency International, *Overview of corruption within the justice sector and law enforcement agencies in Bangladesh*, (2012), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CF0QFjAH&url=http%3A%2F%2Fwww.u4.no%2Fpublications%2Foverview-of-corruption-within-the-justice-sector-and-law-enforcement-agencies-in->

the absence of formal appointment rules, low salaries and inadequate facilities further discourages senior lawyers from coveting the office of the Prosecutor.³⁰⁶

Bangladesh, unlike India and Pakistan, continues with the institution of police prosecutors; they are appointed by the Magistrates under certain conditions, such as during the absence of the Public Prosecutor.³⁰⁷ Md. Ashrafuzzaman, Programme Assistant at ALRC writes about how many of these police officers are not trained lawyers, nor do they have any training in prosecution; they are simply transferred from the police station to the Prosecutor's office.³⁰⁸ While talking about Public Prosecutors, Ashrafuzzaman further refers to their practice of using the office to "advance their private practice"; this sometimes results in prosecutors being under-prepared, or even absent, for hearings.³⁰⁹ It is therefore unsurprising that the conviction rate is approximately 10% in Bangladesh.³¹⁰

C. The Judiciary

(I) BACKLOG IN THE JUDICIAL SYSTEM

The US State Department estimates a backlog of 2 million civil and criminal cases in the judicial system in 2012.³¹¹ The problem is particularly acute in the criminal justice sphere, with the average time for disposing a criminal case being 3.7 years.³¹² Moreover, 179,046 criminal cases were pending before the High Court division of the Supreme Court as of 31st January, 2014.³¹³

Odhikar, a Bangladeshi NGO in its 2013 human rights report on Bangladesh cited the following Supreme Court statistics regarding backlog in the lower judiciary as of 1st January, 2012:³¹⁴

bangladesh%2Fdownloadasset%2F2800&ei=n1DgU__tIM6syASMk4HgBg&usg=AFQjCNEZOipohnhka8sXqo-jWt1x_73EeA&sig2=Ui4b30HuNPWB6PUzAq6KXw&bvm=bv.72197243,d.aWw>, at 5.

³⁰⁶ Md. Ashrafuzzaman, *The Disposable Prosecutors of Bangladesh*, Asian Legal Resource Centre, <<http://www.article2.org/mainfile.php/0701/309/>>.

³⁰⁷ Sections 492(2) of the Bangladesh CrPC empower the District Magistrate to "in the absence of the Public Prosecutors, or where no Public Prosecutor has been appointed", appoint police officers of a certain rank. Section 495(4) clearly stipulates that police officers who have been involved in the investigation against the accused cannot conduct the prosecution of the accused.

³⁰⁸ Ashrafuzzaman, *supra* note 306.

³⁰⁹ Ashrafuzzaman, *supra* note 306.

³¹⁰ US State Department, *supra* note 5, at 15, citing the National Human Rights Commission Report.

³¹¹ It seems that this figure only includes cases in the lower courts, a fact reinforced by the Supreme Court statistics cited by Odhikar in Odhikar, *Human Rights Report 2012*, Bangladesh, 2013, <<http://odhikar.org/wp-content/uploads/2013/01/report-Annual-Human-Rights-Report-2012-eng.pdf>>, at para 278. Also see US State Department, *Bangladesh: Country Report on Human Rights Practices for 2013*, <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper>>.

³¹² This figure was arrived on the basis of a judicial baseline survey conducted by the UNDP's Judicial Strengthening (JUST) Project covering 4320 households and 825 court users.

³¹³ JUST, *Seminar on Criminal Case Management*, UNDP, <<http://www.justbd.org/just/contents/newsletter1.pdf>>.

³¹⁴ Odhikar, *supra* note 311, at para 278.

Table 23: Court-wise breakdown of the backlog in the Subordinate Judiciary, 2012

Courts	Number of cases being heard
Judicial Magistracies	More than 1 million
Criminal cases pending with the Sessions Judge's Courts	Approximately 374,000
Civil cases pending with the lower courts	Approximately 701,000
Total	More than 2 million

The ALRC released a study in 2010 calculating the judge to case ratio in Bangladesh to be 1:868. More problematically, they found disparity in the distribution of workload. For instance, 27 Metropolitan Magistrates in the Dhaka Metropolitan Magistracy were dealing with 115,533 cases. The Joint District Judge in Dhaka's Land Survey Tribunal was alone handling 3000 cases.³¹⁵

(II) CORRUPTION

As per the Transparency International 2010 Global Corruption Barometer, the Bangladesh Judiciary is scored at a 3.5 on 5 (with 5 being most corrupt); a fact corroborated by their household survey that rated the Judiciary as the second most corrupt public institution.³¹⁶ 88% of the 6000 households seeking judicial services described being subject to harassment and corruption.³¹⁷ In practice, this translated into bribery for 59.6% of the households:³¹⁸

Table 24: Transparency International Household Survey on the reasons for bribing the judicial service, 2010

Reasons for bribery	Percentage of households
For expediting the hearing of trial	56.3%
For deferring the date of hearing	6.3%
For influencing the verdict of trial	32.7%
For collecting documents	22.2%
For hiding documents	1%

Source: Transparency International, Corruption in the Services Sectors, National Household Survey (2010)

A combination of factors explains the prevalence of corruption – low salaries (entry level basic salaries are 6800taka or less than \$100); ineffective monitoring and lack of disciplinary action; poor working conditions; and lack of judicial independence.³¹⁹ The ALRC in a written submission to the UN Human Rights Council talked about the government control on judicial appointments, promotions and transfers and how “*political loyalty to the ruling regime is deemed the key qualification for promotion and lucrative postings of judicial officers.*”³²⁰

³¹⁵ Asian Legal Resources Centre, *supra* note 263, at 100.

³¹⁶ U4, *supra* note 305, at 2.

³¹⁷ Transparency International, *Corruption in the Service Sectors: National Household Survey, 2010*, <http://www.ti-bangladesh.org/research/Executive%20Summary_23122010%20FINAL.pdf>, at 7.

³¹⁸ *Ibid*, at 10.

³¹⁹ U4, *supra* note 305, at 2-4.

³²⁰ Asian Human Rights Commission, *Bangladesh: Judiciary undermines its own Independence*, 2nd June 2005, <<http://www.humanrights.asia/news/alrc-news/human-rights-council/hrc26/ALRC-CWS-26-06-2014>>, at para 4.

D. Prison officials

The Improvement of the Real Situation of Overcrowding in Prisons (“IRSOP”) Project run by the German development corporation GIZ in conjunction with the Bangladeshi Home Affairs Ministry and Prison Authorities notes that the overcrowding in prisons is caused in part by the practice of “safe custody”. This involves keeping women and girl victims of violent crimes such as rape or trafficking in prisons for their “own safety”. Although they have not been accused of any offence, these women and children have no safe place to stay, and hence, are kept in prison.

IRSOP’s report also found that prison officials often lose track of the legal status and period of detention of the prisoners (including pretrial detainees); this results in pretrial detainees staying for a period longer than the main sentence and convicted prisoners overstaying their sentence.³²¹

E. Inability to pay the bail bonds

Much like India and Pakistan, the Judiciary in Bangladesh does not discuss the economic circumstances of the accused or the feasibility to pay the required bail amount. In fact, s. 498 of the CrPC only requires a consideration of the “circumstances of the case” and not the circumstances of the accused. However, unlike both India and Pakistan, the cases discussed above did not specify the bail amount, merely stating that the accused would be released on executing a bond to the court’s satisfaction. Hence, it is difficult to ascertain whether the judgments of the court are being translated into actual release of the pretrial detainees; this might explain their high proportion in the prison population.

An interesting case in this context is that of *Abdul Lateef v State*³²² where the accused was charged with smuggling contraband goods. The Special Tribunal while granting bail imposed unusual conditions requiring that among the accused’s sureties, one must be an income tax payee and the second one, the Local Union Parishad Chairman, in addition to the filing advocate. The accused was granted four days (instead of the same day) to furnish the bail bond. As the High Court Division of the Supreme Court observed while criticizing the “highly irregular” ruling, it was unclear where the accused would be lodged for those four days. Notwithstanding this, the accused was denied bail based on the gravity of the offence and the fact that the trial was still in progress.

F. Inability to effectively utilize the legal aid provisions

Lack of legal aid has been a major cause of overcrowding in prisons according to the Minister of State for Home Affairs, Asaduzzaman Khan.³²³

³²¹ BMZ (Federal Ministry of Germany for Economic Cooperation and Development), Promising Practices: On the Human Rights-Based Approach in German Development Cooperation; Justice Reform: Improving the Situation of Overcrowding in Prisons in Bangladesh, April 2013, <http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/promising_practices_justice_reform_in_bangladesh.pdf>.

³²² (2001) 21 BLD 69.

³²³ <<http://observerbd.com/details.php?id=17755>>.

As Ian Morrison, Director of the Bangladesh Legal Aid Reform Project notes, from 2001 to 2008, political compulsions meant that the government did not appoint any central authority, full staff or full time director of the National Legal Aid Organization; nor did it hold the District Boards accountable for the funds disbursed to it.³²⁴

Even then, partly responsible for the failure in accessing legal aid is the lack of staff and logistics, the distance of the legal aid offices from the city centre, the low fees paid to lawyers (only 300 taka or approximately \$4) and the non-involvement of senior lawyers.³²⁵ Corruption is an added factor the non-disbursement of legal aid funds to the genuinely needy applicants given the extent of corruption and the fact Bangladesh ranks 136 of the 177 countries in Transparency International's Corruption Perception Index.

V. Solutions and Recommendations

A. The IRSOP Project

The IRSOP Project run by GIZ alongside the Bangladeshi government has tried establishing paralegal aid services to “bridge the gap between prisoners, courts, police and lawyers” and to provide legal assistance to the poor and vulnerable. Currently, it is a pilot project working in three of the 68 prisons (Dhaka Central Jail, Bogra and Madaripur District Prisons), with plans of expanding it to 40 prisons by 2017. The model involves intensive training of paralegals by judges, Magistrates, police officers, prison officials and lawyers and has been accompanied by support services provided by NGOs such as BRAC in Dhaka, BLAST in Bogra and Madaripur Legal Aid Association in Madaripur. As part of the pilot project, the paralegals administered a census of the prison population at the three prisons to get a better sense of their legal status, and more specifically, to collect the following information:

- the proportion of the prison population which was poor;
- the proportion of the prison population with legal representation;
- the average time spent in custody as a pretrial detainee;
- the total number of women and children in prison, including the number in safe custody;
- the proportion of prison population who could not afford the terms of the bail bond and therefore could not be released (despite being granted bail); and
- the proportion of prisoners who overstayed the terms of their warrant.

The paralegals then disbursed this information to all the relevant actors, namely the lawyers, the prosecutors, the courts, police officers and prison officials to spur action. These actors constituted a Case Coordination Committee (CCC) to meet monthly to decide on the relevant course of action and to measure their performance against the baseline census data.

³²⁴ Ian Morrison, *supra* note 299.

³²⁵ Daily Star, *supra* note 300.

Simultaneously, the project also trained paralegals to give legal assistance to the prisoners and their families. This involved holding “court yard clinics” to inform the prisoners about basic legal procedures commencing from the point of arrest to appeal, to enable them to represent themselves in case they could not afford to hire a lawyer. In many cases paralegals also helped contact a prisoner’s family (or the foreign embassy in case the detainees were foreigners) and provided legal or social support on release.

The combined efforts of these initiatives led to the discharge of over 2,500 prisoners at the three pilot prisons and reduced the instances of safe custody in Bogra and Madaripur. IRSOP observed a further intangible benefit of increased trust and collaboration between the various stakeholders; this had a cumulative impact in increasing transparency and effectiveness of the entire criminal justice system.³²⁶

IRSOP’s work went beyond this project to supporting the government in organizing a SAARC level conference on Prison Reform where the delegates (except Afghanistan) adopted the *Dhaka Declaration on Reducing Overcrowding in Prisons in South Asia* in 2010. The full text of the resolution is available here < <http://www.penalreform.org/wp-content/uploads/2013/05/Dhaka-Declaration-FINAL-version-October-7-0.pdf>>. It reiterates that pretrial detention is a measure of last resort and that increasing prison capacity is not a solution for overcrowding.

³²⁶ BMZ, *supra* note 321.

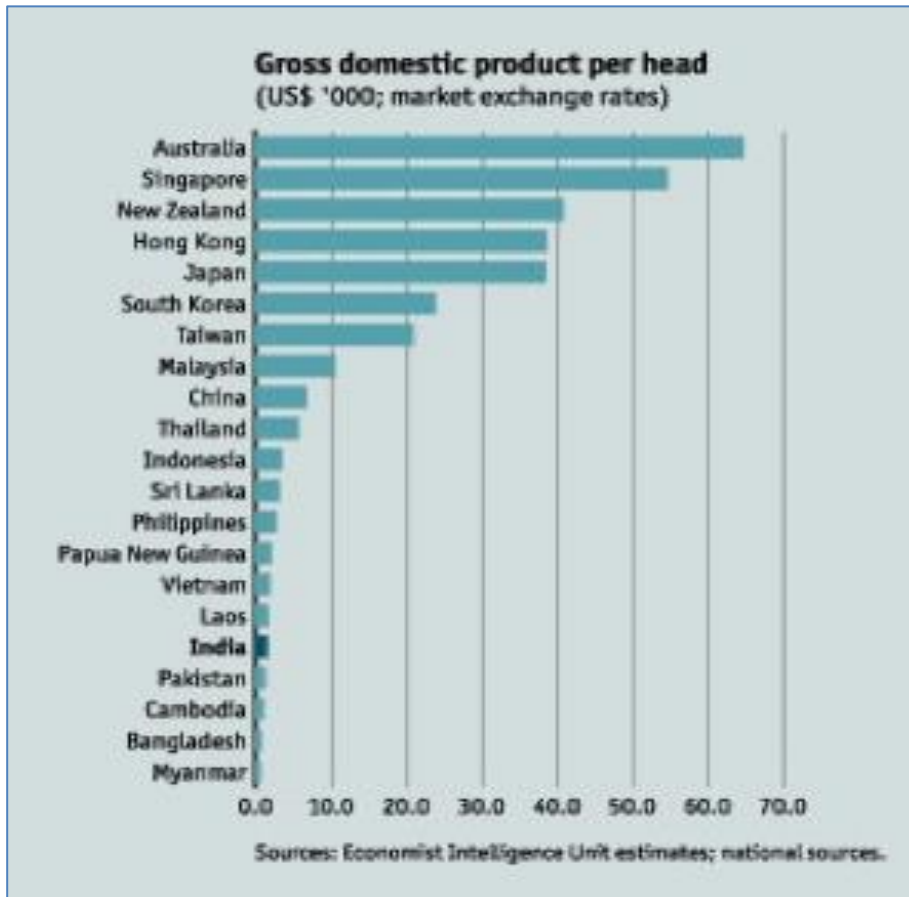
Analysis: Common themes explaining the high incidence of pretrial detention in India, Pakistan and Bangladesh

The number of pretrial detainees as a proportion of all prisoners in India, Pakistan, and Bangladesh is 66.5%, which is more than double the global average. This figure is even more unusual when one considers that the combined rate of pretrial detention in these South Asian countries (at 22.4 per 100,000 people) is only half the global average. This report has tried to unpack the causes for the high prevalence of pretrial detention by focusing on the various functionaries in the criminal justice system, the profile of the pretrial detainees and the effectiveness of the legal aid system.

A quick perusal of the country reports above makes clear that the laws and jurisprudence of these three countries point towards the grant of bail as a rule and pretrial detention as an exception. Courts in all these countries stress the importance of the principle of presumption of innocence and liberty of the accused. In part, this might clarify the low rate of pretrial detention and why as a proportion of total population, it is low. Other possible explanations include the non-reporting and non-recording of certain crimes; the non-reporting of arrests; and the ability of the rich to bribe their way out of prison. In the absence of empirically verifiable data, these remain mere hypotheses. Nevertheless, even if there are fewer persons in prison compared to the rest of the world, it is not immediately obvious why approximately two-thirds of them are awaiting trial. Having examined each country in detail in terms of the functionaries of the criminal justice system, it is pertinent to identify common issues/challenges throwing light on the high number of pretrial detainees as part of the prison population.

Before we start, it is useful to reiterate that India and Pakistan are classified as lower middle-income countries and Bangladesh is a low-income country. All three have relatively similar Gini index rankings and a similarly low GDP per head.³²⁷

³²⁷ Economist Intelligent Unit, *India*, *supra* note 12.



I. High incidence of corruption

The problem of corruption is pervasive in the three countries. As per the various Transparency International corruption surveys in 2013, the data is as follows:

Table 25: Performance of India, Pakistan, and Bangladesh on various corruption barometers, including the percentage of people reported paying a bribe to the police or the Judiciary

Country	Corruption Perception Index rank (out of 177)	Control of Corruption percentile rank	% of people reported paying a bribe to the police*	% of people reported paying a bribe to the Judiciary*	Institution perceived to be most affected by corruption
India	94 with a score of 36/100	36%	62%	36%	Political parties (86% of the respondents)
Pakistan	127 with a score of 28/100	12%	65%	36%	Police (82% of the respondents)
Bangladesh	136 with a score of 27/100	16%	72%	63%	Police (64% of the respondents)

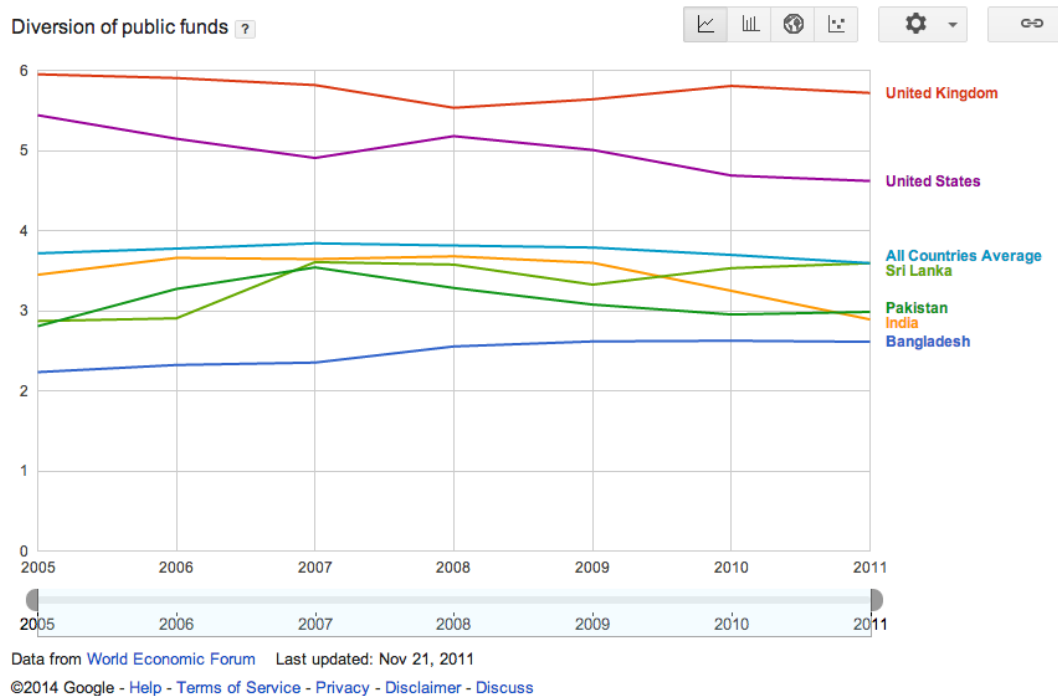
Source: Control of Corruption Index, 2010; Corruption Perceptions Index, 2013; Global Corruption Barometer, 2013

* These results are shown only for those who came into contact with the police and the Judiciary.

Corruption has a direct impact on the number of pretrial detainees – it facilitates the payment of bribes to police officers to (not) register a crime, (not) record an arrest, and be released from jail; bribes to judges for grant of bail; evidence tampering and intimidation of witnesses and victims; mis-utilization of legal aid funds; and non-implementation of the laws. In low and middle-income countries such as these, it unduly affects the poor, illustrated by the disproportionately lower socio-economic profile of pretrial detainees.

The graph below looks at the diversion of public funds; it would include instances of (mis)utilization of budgets meant for prisons, Legal Aid Committees and improvement in the physical infrastructure of public institutions such as the courts, the police stations, public prosecutors offices etc. India, Pakistan and Bangladesh are all below the global average exemplifying the pervasiveness of the problem.

Graph 2: Diversion of public funds to individuals, groups or companies because of corruption



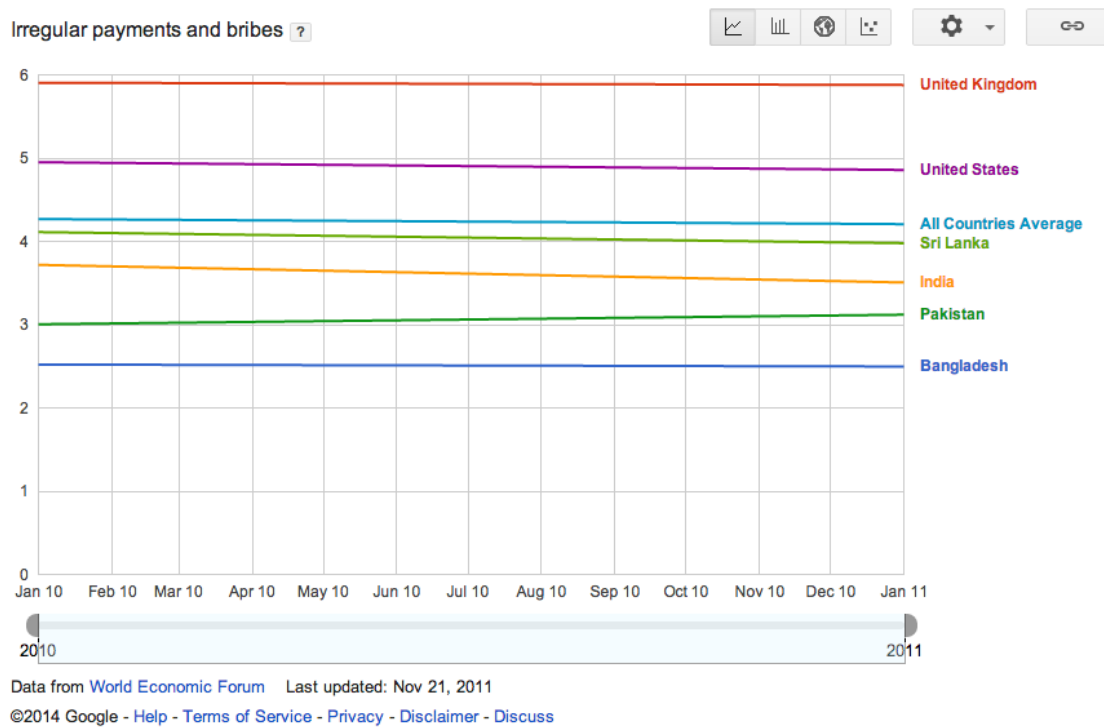
Source: World Economic Forum data, where a score of 1 means corruption is very common and 7 means it never occurs.

In 2002, Transparency International conducted an extensive household survey on corruption amongst the five South Asian countries of India, Pakistan, Bangladesh, Nepal and Sri Lanka. The results revealed the police to be the most corrupt of the seven major public institutions in all five countries, with the Judiciary coming in second. The only exception was Pakistan, where the land administration and tax authorities followed the police in decreasing order of corruptibility.³²⁸ As the graph below corroborates, payment of bribes to obtain favourable decisions (although not only for criminal cases) is not uncommon in India, Pakistan and Bangladesh, which are all below the global average. This

³²⁸ Transparency International, *supra* note 87.

again brings into focus the profile of pretrial detainees and whether the system works against the poor.

Graph 3: Irregular payment and bribes by firms, for *inter alia*, obtaining a favorable judicial decision:



Source: World Economic Forum data,

II. Shortage of human, physical and monetary resources

As has been mentioned above, most public institutions are understaffed, underpaid and overworked. This is best illustrated in the following tables and graph that compare the strength of the police and judicial force with the rest of the world:

Table 26: Current police personnel numbers and police-population ratios in South Asia in comparison with Brazil, Russia and USA

South Asian Countries	Total Police Personnel*	Rate per 100,000 population	Police to population ratio (2009)
India	1,580,311 (2010)	131.1 with only 12.5 women officers per 100,000 females	1:728 (1 police officer per 728 population) although in 2012 this worsened to 1:761
Pakistan	354,221 (2011)	204.05	1:625
Bangladesh	139,546 (2013)	89.1	1:1200
Nepal	56,064 (2006)	218.7	
Sri Lanka	63,984 (2004)	324.2	
Other Countries			
Brazil	275,571 (2010) which increased to 487,255 in 2012	141.2 (increased to 245.3 in 2012)	
Russia	779,846 (2010), although this fell to 746,996 in 2011	543 (decreased to 520.8 in 2011)	
USA	705,009 (2010), although this fell to 670,439 in 2012	225.8 (decreased to 211.2 in 2011)	

Source: Network for Improved Policing in South Asia;³²⁹ UK Country of Information Report for Bangladesh;³³⁰ United States Institute of Peace;³³¹ and UNODC³³²

* Police personnel include those whose primary function in public agencies is the prevention, detection and investigation of crimes. This excludes support staff such as secretaries and clerks.

Combining investigatory functions with law and order duties further aggravates the problem of an under-staffed police force, which is already diverting a sizable share of the strength for (VIP) security detail. For instance, in India as described above, there are 3 officers for every “protected person”, but 1 officer for 761 common citizens. This is an acute problem across the three countries and coupled with manpower shortages, inadequate training and low incentives affects the reliability of police services. Reliability can include factors like registration of the FIR, conduct of investigation, arrest of suspects treatment in prisons, and even escorting the accused to court for hearings; all factors having a direct bearing on the number and status of pretrial detainees.

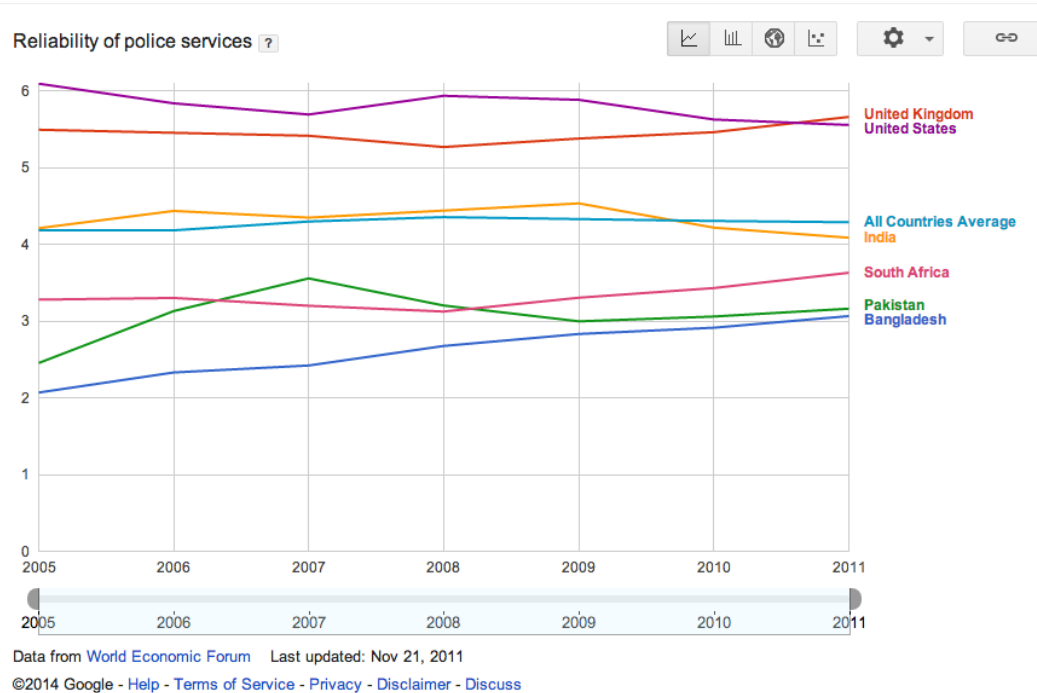
³²⁹ These statistics are taken from the NIPSA (Network for Improved Policing in South Asia) <http://www.nipsa.in/bangladesh>. The UNODC figures are only available until 2006 and record that the total strength of the police force was 123,197 officers, with 85 police personnel per 100,000 population. The population for 2013 is taken as

³³⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310010/Bangladesh_COI_report_2011.pdf at para 8.03.

³³¹ USIP, *supra* note 102, at 6. The population for 2011 is taken as 173.59 million as per UN estimates. This means that the number of police officers per 100,000 population is 204.05.

³³² UNODC, *supra* note 18.

Graph 4: Reliability of police services



The Judiciary fares no better, with the judge population ratios (although only approximate figures) being far below other countries. Unfortunately, the table below does not even reveal the problem of judicial vacancies – the difficulty in appointing the sanctioned strength of judges. The country report for India discusses this problem in further detail.

Table 27: Current judge to population ratios in South Asia compared to other countries

Country	Judge to population ratio (number of judges per million population) (approximately)
South Asian countries	
India	13 to 15.5
Pakistan	12
Bangladesh	12
Other countries	
Germany	45
Australia	58
Canada	75
France	80
United Kingdom	100

Source: the Asia Legal Resource Centre;³³³ the Daily Pioneer;³³⁴ the IMF;³³⁵ and the Tribune³³⁶

³³³ Asian Legal Resources Centre, *supra* note 263.

³³⁴ Joginder Singh, *supra* note 266.

³³⁵ IMF, *supra* note 120, at para 12.8.3.2

³³⁶ R.D. Sharma, *supra* note 119.

Although comparable data is not available for the strength and salary of the prosecutor's office and prison officials, anecdotal (India and Pakistan) and empirical evidence suggest that is a problem as well.

The shortage of physical, human and monetary resources combine to reduce the incentive of the functionaries of the criminal justice system. Their consequent apathy means that fewer persons are arrested, prosecuted and convicted and many pretrial detainees are eventually acquitted. The conviction rates for both Pakistan and Bangladesh are under 12%.³³⁷ As per the NCRB, the conviction rate for all cognizable IPC crimes in India was 38.5%, although it was substantially lower for rape (24.2%), attempt to murder (26%) and murder (35.6%).³³⁸ A participant's paper at the 144th International Senior Seminar organized by UNAFEI graphed the conviction rates of different countries (although did not explain the derivation of the rates):³³⁹

Graph 5: Conviction rates in India, Pakistan, Australia, Japan, South Africa, and USA



Since convictions are uncommon, pretrial detention starts being viewed and used as a punitive measure; therefore, a disjuncture is created between the theory and practice of law.

III. Backlog of cases

Backlogs are particularly problematic in South Asia as evidenced below:

³³⁷ ICG, *supra* note 193; Waheed, *supra* note 5; US State Department, *supra* note 5.

³³⁸ NCRB Table 4.12. But note that the calculation of conviction rates in India looks at the number of convictions by the number of cases; often the numerator and denominator can represent different cases. Hence, this number is not completely reliable because it does not compare the number of convictions with the number of cases registered.

³³⁹ Waheed, *supra* note 5, at 144.

Table 28: Current backlog of cases in India, Pakistan, and Bangladesh

Country	Number of cases pending
India	30 million cases, with 64,330 cases pending before the Supreme Court as of 1 st April, 2014
Pakistan	1.6 million cases in 2012. As of 1 st April, 2014, the Supreme Court has a pendency of 20,147 cases, up from a pendency of 18,841 in April, 2013.
Bangladesh	Estimated 2 million civil and criminal cases in the lower judiciary; with a judge to case ratio of 1:868

Source: Asian Legal Resource Centre;³⁴⁰ the Indian Supreme Court,³⁴¹ the Pakistani Supreme Court;³⁴² and the US State Department³⁴³

Similar to the fear of acquittal, delays in the conclusion of the trial can also result in pretrial detention being used as a punitive measure. They also spawn informal justice measures such as plea-bargaining or “*jail adalats*” (in India), where fewer procedural safeguards nudge the accused to plead guilty to escape detention in lieu of the time already served. In practice, judicial backlog (by keeping more people in the system) also affects the number of pretrial detainees *able* to benefit from legal aid.

IV. Governance issues and a lack of coordination

Examining the incidence of pretrial detention in India, Pakistan, and Bangladesh reveals a common theme of non-implementation of laws, policies and judicial directives; whether it is the Undertrial and Periodic Review Committees in India; the National Judicial Policy in Pakistan; or the legal aid system in Bangladesh. This transpires due to a variety of reasons – delay or non-appointment of the requisite officials, misappropriation of funds, political apathy, low levels of legal literacy, and lack of coordination amongst various agencies such as the police and prison officials.

The Executive wields influence on the appointment and salaries of the prosecutors, the police, prison officials and judges. Its motivations thus become very important, whether it causes large number of vacancies in the Judiciary in India (in part due to the collegiate system) or in the post of the Prosecutor General in Punjab, Pakistan. Governance issues also influence judicial independence and the rule of law, which is symptomatic of the problem of pretrial detention:

Table 29: Judicial independence and rule of law percentile rank in India, Pakistan, and Bangladesh

Country	Judicial Independence rank (out of 142)	Rule of Law percentile rank
India	51 with a score of 4.3/7	55%
Pakistan	62 with a score of 3.9/7	26%
Bangladesh	90 with a score of 3.2/7	27%

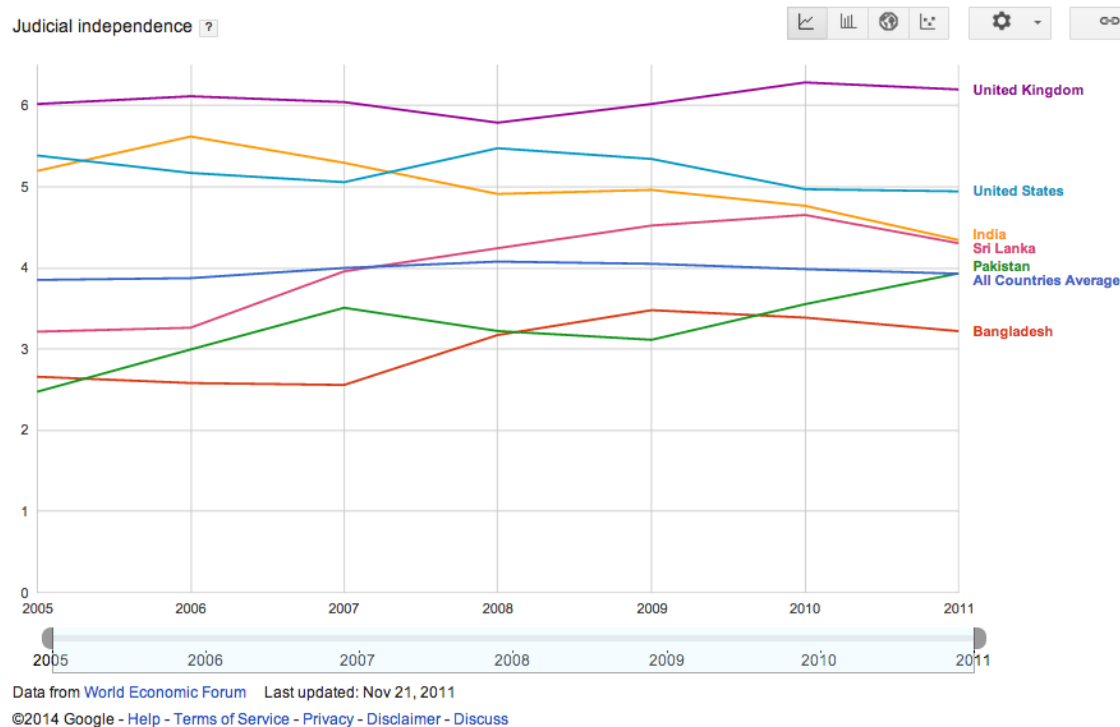
³⁴⁰ Asian Legal Resources Centre, *supra* note 263.

³⁴¹ Supreme Court of India, *supra* note 114.

³⁴² Supreme Court of Pakistan, *supra* note 230, at 3.

³⁴³ US State Department, *supra* note 311.

Graph 6: Judicial Independence from members of government, firms and citizens



Source: World Economic Forum data where 1 means the judiciary is heavily influenced and 7 means it is entirely independent

The graph above looks at judicial independence and the freedom of the Judiciary, including the subordinate judiciary to make a decision. This could include instances referred to in the Pakistan section, of judges being influenced in blasphemy cases or cases involving violent crime. Both Pakistan and Bangladesh are at or below global average. The country report on Bangladesh describes the problem in further detail.

V. Concluding Remarks

The report began by analyzing the laws and practice of India, Pakistan and Bangladesh from the perspective of the functionaries of the criminal justice system, the profile of the pretrial detainees and their (in)ability to post bail, and the effectiveness in accessing legal aid. This section has tried to cut across those themes by identifying common factors, which might explain the high proportion of pretrial detainees amongst the prison population. These factors are the high incidence of corruption; the inadequate number of human, physical and monetary resources; the problems caused due to a backlog of cases; and governance

Unfortunately, as is evident, these factors do not function independently of each other in a vacuum. Instead, they influence and are influenced by each other. For instance, a lack of human resources leads to judicial backlogs, which result in cases not being called or being

inordinately delayed;³⁴⁴ shortage of funds and people makes it difficult to find police officers to accompany the accused, causing the pretrial detention to be routinely extended (without the accused's appearance).³⁴⁵ Even poor coordination amongst the prosecutors, police and prison officials leads to oversight regarding the legal status of various pretrial detainees, especially those who have been in prison for longer than the sentence.

Consequently, solutions to solve the problem of excessive pretrial detention requires a holistic approach, and knowledge of the impact of influencing one lever of the criminal justice system on the other. More effort needs to be spent in understanding the scope and extent of the problem in terms of intra-country variation and the practice on the ground; currently, data is not easily available).

Furthermore, the relationship between the different causal factors (the functionalities of the criminal justice system and the profile of the pretrial detainees) and how they interact with, and are influenced by, each other needs to be clarified. It requires governments to go beyond quick fixes to understanding the underlying reasons for the problem to be able to resolve them. Thus, is police corruption merely a consequence of low pay, or is it caused by a combination of factors involving low incentive structures, lack of oversight and a culture of impunity? Can simply sanctioning more money to build courtrooms and appoint judges reduce backlog, or does it require case management to allow judges to control their dockets and take action when the accused is not produced before them?

There are no easy answers beyond suggesting better coordination amongst different functionalities, sharing of best practices amongst countries and mapping the landscape to prevent duplication of work. Emphasis should be on ensuring the implementation of existing provisions and directives, instead of merely starting new initiatives and the mapping of landscapes to prevent duplication of work.

³⁴⁴ J. Sandefur, B. Siddiqi, and A. Varvaloucas, *Baseline Evaluation Report* (Unpublished draft, Open Society Justice Initiative, 2011 cited from OSJI, *Improving Pretrial Justice: The Role of Lawyers and Paralegals*, OSF, 2012, <<http://www.opensocietyfoundations.org/sites/default/files/improving-pretrial-justice-20120416.pdf>>.

³⁴⁵ Saxena, *supra* note 94, at 60; Baguenard, *et al.*, *Activating the Criminal Justice System in Bangladesh*, (2005).